2018
First Quarter

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KENTUCKY

PENAL CODE

PENAL CODE – KRS 507 - HOMICIDE

Orten v. Com., 2018 WL 1355567 (Ky. App. 2018)

FACTS: On July 4, 2015, Orten was speeding through Christian County when he struck another vehicle in the rear. Three of the four passengers were ejected, two of the four occupants in that vehicle died. Orten claimed that the occupants of that vehicle had committed a violent home invasion earlier that same night.

Orten was charged with Murder and Assault. He moved to dismiss, arguing he was justified in using deadly force against the occupants of the other vehicle. The Commonwealth argued that witnesses indicated that the occupants had delivered drugs to Orten that night and that he became enraged when they demanded payment. Two of the occupants had taken a TV in

payment. Cooper, a witness, indicated she saw no firearms or violence at the Orten home. Several other witnesses, including Miles, one of the surviving occupants in the truck, reported that two of the other occupants were armed. The other surviving occupant, Forrester, also testified

The Court denied his motion, noting that the homicides occurred after the subjects had left the house and Orten was not being subjected to any force or threat at the time. Any imminent threat dissipated when the vehicle left Orten's home. He became the aggressor at that point.

During pretrial hearings, a number of evidentiary issues were addressed. At the trial, Orten argued that he wasn't not chasing them and didn't see them until the last moment. Several witnesses testified that Orten told them about the home invasion at the time of the crash.

Orten was convicted or Reckless Homicide and assault under EED and appealed.

ISSUE: Is a choice of evils instruction needed when the defendant simply claims they had to make that choice?

HOLDING: No (but see discussion)

DISCUSSION: Among other issues, Orten argued that he should have been given a "choice of evils" defense instruction under KRS 503.030. The Court noted that Orten failed to establish any imminent harm nor did he describe that any family at risk, since the home invaders would have no way to even find his children, who were at the home of a grandparent. In fact, he didn't even realize the home invaders were in the vehicle he struck.

On an unrelated note, the Court address information the Commonwealth received from a CI who was in regular contact with Orten after the crime. He was given a recorder and he shared some information, but nothing that was used in the prosecution. The Court agreed the situation was not ideal, but since they used no information from it, there was nothing improper done with respect to the trial proceedings.

Orten's conviction was upheld.

Com. v. Caudill, 540 S.W.3d 364 (Ky. 2018)

FACTS: Caudill was accused of the shooting death of Carpenter, a neighbor, with whom he'd had a tumultuous relationship. Several others lived in the same area and witnessed the altercation, in which both men were armed. Both fired shots that struck the other, but only Carpenter died. The three witnesses were forced to seek cover as the firing commenced.
Caudill was charged, and claimed self-defense. He was convicted of Murder in Breathitt County, as well as Wanton Endangerment. The convictions were overturned and he was retried. That jury found him guilty of Wanton Endangerment, for the three witnesses, but not

Murder. Caudill appealed. The Court of Appeals found in his favor and the Commonwealth appealed.

ISSUE: Is the wanton state of mind applicable in a self-defense case?

HOLDING: No

DISCUSSION: Caudill argued that it was illogical to find he acted in self-defense in the murder charge and still find him guilty of wanton endangerment of other victims in the same shooting. The Court noted that KRS 503.120(2) "precluded justification as a defense to crimes involvement wantonness or recklessness towards innocent victims, even when the defense is available as to another victim."[1] The instructions to the jury were not as clear as they should have been on the issue, but the error was harmless.

The Court reinstated his convictions.

PENAL CODE – KRS 508 - WANTON ENDANGERMENT

Robinson v. Com., 2018 WL 565826 2016-CA-000151-MR (Ky. App. 2018)

FACTS: On October 19, 2014, Officer Mayo, Fulton PD, observed a speeding vehicle. He pursued but lost the vehicle. A few days later, a family friend told the officer about observing a speeding vehicle in her area that pulled behind the Robinson home as she heard sirens nearby. She identified the driver as Robinson. Another witness who had almost been struck by the fleeing vehicle was also identified.

Robinson was charged with Fleeing and Evading, Wanton Endangerment and related charges. He was convicted and appealed.

ISSUE: Does almost striking an individual in a vehicle warrant a Wanton Endangerment charge?

HOLDING: Yes

DISCUSSION: Robinson argued that he was not proven to have committed the offense of wanton endangerment and that the witness's testimony about almost being struck was more hypothetical rather than what did happen. The Court agreed that the jury could find the near miss as reflecting the required mental state for the offense, as Robinson drove at a high rate of speed, almost caused a collision and then drove on. Robinson argued that the officer and the witness who was almost struck never saw the driver, as well. However, the Court agreed, there was sufficient circumstantial evidence for a jury to conclude that Robinson was the driver.

[1] Justice v. Com., 608 S.W.2d 74 (Ky. 1980).

Further, the court agreed that the two charges did not constitute double jeopardy, as they pass the "same-elements" test in Blockburger v. U.S.[2] Finally, Robinson argued that because the jury could have seen his white paper bracelet that indemnified him as an inmate, his rights were violated. No one noticed initially that the bracelet was in view below the cuff of his long-sleeved shirt, but it resembled a hospital bracelet. When noticed, it was removed The Court agreed that any prejudice was minimal.

The Court upheld his conviction.

PENAL CODE – KRS 514 - THEFT

White v. Com., 2018 WL 1444243 (Ky. App. 2018)

FACTS: On April 12, 2012, White and Glass entered a Paducah Kohl's department store with apparently empty purses. They entered dressing rooms with merchandise and then left with full purses Thomas, a LP officer, watched them leave and then reviewed them on video. Thomas noted they chose items from the junior section and paid no attention to price or size tags, but simply grabbed items. They went into a single, larger, handicapped room together. Glass emerged with few items than she entered, and White's bag was not zipped and clearly contained clothing. When Thomas entered the dressing room, she found 15 hangers and several security tags, when the room had been empty before. She followed the pair to the parking lot, and obtained their license tag after they refused to come back inside. Officer Collins as summoned, and she identified White from an OL photo. (He obtained White's photo by running the tag.)

Thomas estimated from the evidence that $680 in merchandise was taken and it was never recovered. White was convicted of Theft under $500. She was convicted and appealed.

ISSUE: May circumstantial evidence support a theft charge?

HOLDING: Yes

DISCUSSION: White argued the evidence was purely circumstantial and insufficient for conviction. The Court agreed that there was sufficient evidence for at least complicity to commit the theft, with Glass. Thomas actually saw her take an item that was later seen to be in her purse, on the video.

The Court upheld the conviction.

Hall v. Com., 551 S.W. 3d 7 (Ky. 2018)

[2] 273 U.S. 1 (1932).

FACTS: On the day in question. Hall fled from a Walmart in Perry County, as a shoplifting suspect. He drove away and was spotted by Officer Everidge (Hazard PD). Hall pulled over but immediately fled on foot. Everidge pursued as did Officer Maggard, on foot. Hall circled back and got into Officer Maggard's cruiser. He sped away. Officers Everidge and Jones pursued at a high rate of speed. They found the cruiser abandoned, within a half hour. Hall was arrested a few days later.

Hall was convicted of Theft, for the cruiser, as well as resisting arrest and Wanton Endangerment. He appealed.

ISSUE: Is taking a cruiser to escape necessarily a theft?

HOLDING: No

DISCUSSION: Hall argued that there was no evidence that he intended to deprive the department of its cruiser, and that he should have been given a directed verdict on that charge.

The Court noted:

> Hall's argument implicates a larger issue surrounding KRS 514.030(1)(a) and 514.010(1)--specifically, the meaning *of, intent to deprive* under the first definition of *deprive* given in KRS 514.0lO(l)(a), i.e. possessing the *intent to withhold property of another permanently.* KRS 514.030(1)(a) states, "[A] person is guilty of theft by unlawful taking or disposition when he unlawfully: Takes or exercises control over _movable property of another *with intent to deprive* him thereof." KRS 514.010(1) defines *Deprive* to mean: "(a) To withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value or with intent to restore only *upon* payment of reward or other compensation; or (b) to dispose of the property so as to make it unlikely that the owner will recover it."

The Court reviewed the four definitions of deprive in the statute. It noted that he stole a marked cruiser and had to be aware that the officers were in pursuit of him. He left the vehicle in the middle of the road, where it would clearly be seen. He certainly did not intend to withhold the cruiser permanently. It agreed that "To interpret correctly *intent to withhold property of* another *permanently* is to say that the defendant intends that the property never be restored to its rightful owner, where intent can be inferred from facts and circumstances." Evidence could show, as it did in this case, that Hall intended that the vehicle be available to be restored to the police department. Instead of theft, the Court agreed, he was simply trying to evade the police, to get away.

The Court looked to previous cases: Waddell, Byrd, Lawson, and Caldwell have held, the taking and abandoning of property could allow the jury to infer that the defendant had the

intent to withhold permanently the victim's property from the victim, i.e. intending that the property never be restored to the true owner.[3]

In this decision, the Court agreed, it overruled any past precedent that conflicts with its decision that under such circumstances, theft is not an appropriate charge. It acknowledged that a proper charge in this case would have been, for example, Unauthorized Use.

The Court upheld a conviction for Wanton Endangerment, with Officer Everidge as the victim, given the circumstances of the struggle that occurred as he took the cruiser.

PENAL CODE – KRS 524 -- TAMPERING

Luttrell v. Com., 2018 WL 898699 (Ky. 2018)

FACTS: Luttrell was charged with the shooting death of Briscoe, in Anderson County. Luttrell fled the scene in the victim's Camaro, which he abandoned a short distance away. He knew the vehicle would likely be found soon, and was aware it had a GPS device. He was convicted of, among other charges, Tampering with Physical Evidence related to the vehicle, and appealed.

ISSUE: Is leaving with an instrumentality of the crime enough for tampering?

HOLDING: No

DISCUSSION: The Court noted that in Burdell v. Com., the Court analyzed KRS 524.100 and the tampering statutes in other states.[4]

> One who conceals or removes evidence of criminal activity contemporaneously with the commission of his crime commits the offense of tampering with physical evidence. "The compelling logic is that one who has committed a criminal act and then conceals or removes the evidence of his crime does so in contemplation that the evidence would be used in an official proceeding which might be instituted against him.

However, simply leaving the scene "with a weapon or instrumentality of a crime is not enough to support a tampering charge without evidence demonstrating an intent to conceal the evidence.[5]

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[3] *See* Waddell v. Com., No. 2013-SC-000499-MR, 2014 WL 2810080 (Ky. June 19, 2014); Byrd v. Com., No. 2007-SC-000706-MR, 2008 WL 5051612 (Ky. Nov. 26, 2008); Caldwell v. Com., 133 S.W.3d 445 (Ky. 2004); Lawson v. Com., 85 S.W.3d 571 (Ky. 2002).

[4] 990 S.W.2d 628 (Ky. 1999).

[5] See Mullins v. Com., 350 S.W.3d 434 (Ky. 2011); McAtee v. Com., 413 S.W.3d 608 (Ky. 2013); Kingdon v. Com., No. 2014-SC-000406-MR, 2016 WL 3387066 (Ky. June 16, 2016)."

In this case, the Court noted, Luttrell clearly tried to hide the vehicle, as it put it inside a shed and was trying to find, and presumably disable, the GPS device. As such, the Court agreed that Tampering was a proper conviction.

NON-PENAL CODE

DUI

Com. v. Judge Goodman (Fayette County), 2018 WL 1357464 2017-(Ky. App. 2017)

FACTS: Brown was arrested on March 7, 2011, for DUI. Officer Steele seized oxycodone and clonazepam from Brown's purse. Both bottles had far fewer pills than they should have from the date prescribed. Brown was confused and nervous. On a blood test, oxycodone and sertraline were found, but she was not tested for clonazepam. She was charged with DUI and moved to dismiss it under Wells v. Com., as she claimed to be sleeping in her car.[6] She argued the only drugs found in her system were those for which she had a valid prescription.

The Court dismissed the charges and the Commonwealth filed for a writ of prohibition.

ISSUE: May someone driving on a medication for which they are prescribed be charged with DUI under KRS 189A.010(1)(c)?

HOLDING: Yes

DISCUSSION: The Court noted that the District Court had ruled that she could not be prosecuted for any drug for which she had a valid prescription. The Court noted that "KRS 189A.010(4)(b) mandates the exclusion from evidence in a prosecution under subsection (1)(d) of substances for which a defendant has a valid prescription." It does not, the Court emphasized, apply to prosecutions under (1)(c). The Court further agreed that suppressing that evidence would cause "a great injustice and irreparable injury" to the prosecution. The Court awarded the writ.

SEARCH & SEIZURE

SEARCH & SEIZURE – SEARCH WARRANT

Staton v. Com., 2018 WL 296971 2016-(Ky App. 2018)

[6] ., 709 S.W.2d 847 (Ky. App. 1986)

FACTS: After receiving a tip that Staton was selling drugs, Sheriff Kirk (Martin County) set up a traffic safety checkpoint near Staton's home. They stopped Horn's vehicle and found him in plain view possession of pills, which he stated he'd bought from Staton.

Using his statement, they obtained a search warrant and found a number of pills and other evidence. Staton was indicted for Trafficking and related offenses. He moved for suppression and was denied. He then took a conditional guilty plea and appealed.

ISSUE: Does a passenger have an expectation of privacy in someone else's vehicle?

HOLDING: No

DISCUSSION: Staton argued that the traffic checkpoint was flawed because it did not "pass constitutional muster." The Court noted that even if that was true, the stop involved Horn, not Staton. As Staton had no expectation of privacy in Horn's vehicle, he had no standing and could not vicariously assert the right. As such, the search warrant was also valid and the motion was properly denied.

The Court upheld his plea.

Mason v. Com., 2018 WL 566462 (Ky. App. 2018)

FACTS: In early 2016, Det. Shirley (Lexington PD) was investigating drug trafficking. He identified Gillespie as being involved and a CI made buys from Gillespie. On March 23, Det. Shirley had "decided that the time had come to arrest him." With other officers, he observed Gillespie make contact with Mason, the sole occupant in a car in the lot. They talked for less than a minute but the officers observed nothing that indicated anything had been passed between them.

Gillespie was arrested. One of the officers communicated with Mason, telling him to provide ID and put the car in park. The officer noted that Mason was shaking. Det. Shirley commenced questioning Mason, as he suspected drug trafficking given the way he positioned his vehicle near the dumpster. He also noted Mason's extreme nervousness. He had Mason step out and they observed digital scales. Mason consented to a frisk and with consent, the detective removed the item, crack cocaine. Mason was arrested.

Mason was charged and moved for suppression. When that was denied, he took a conditional guilty plea and appealed.

ISSUE: May a person be asked to get out of a car in a Terry stop?

HOLDING: Yes

DISCCUSION: The Court characterized the contact with Mason as a Terry stop for investigative purposes. The court agreed the officers were free to approach Mason as he was in a public place, and ask him for identification. The court called the interaction between the first officer and Mason an encounter, rather than a seizure, as Mason answered the questions without an issue. When he was "asked" to get out of the car, even the officer indicated it was a directive, and at that point, Mason was seized. However, it agreed that the officers had articulable reasonable suspicion that he was involved in a crime, as a known drug dealer was seen to be interacting with the car moments before. The court found no issue with having him step out of the car, rather than being questioned inside the car.

Further, Mason consented to the frisk, and the cocaine was lawfully found. The evidence found in plain view was also properly seized.

The Court affirmed the plea.

SEARCH & SEIZURE – TRAFFIC STOP

Com. v. Blake, 540 S.W.3d 369 (Ky. 2018)

FACTS: In 2014, Det. Shoemaker (KSP) was investigating a drug operation in Muhlenberg County. He sent a CI, wired with audio and video, on a controlled buy. Officers watched the CI enter, then the target emerge, talk to a subject in a vehicle inside, and go back inside. They learned the driver of that vehicle to be Blake, who was also rumored to be involved. The CI reported he'd gotten two hydromorphone pills from the dealer, who obtained them from Blake.

A second buy was arranged and Sgt Jenkins (Central City PD) was asked to make a traffic stop on Blake, if possible. Jenkins was aware of the investigation. Again the same scenario occurred and Jenkins was alerted to be on the lookout for a reason to stop the car. He was able to stop her for failing to have her license plate illuminated and he asked for consent to search the vehicle. Officers found $10,000 in cash in her purse and methamphetamine in the glove compartment. Some of the money was that which had been given by the CI earlier.

Blake was charged with Trafficking. She argued that given the timing, with the sun setting at 5:08 and the stop being at 5:16, she was still within the half hour window permitted by the statute. The Commonwealth conceded that point, but argued that Det. Shoemaker had reasonable suspicion and could transfer that knowledge to Sgt. Jenkins to justify the stop. Jenkins, however, acknowledged his reason for the stop was the license plate violation. The Court supported the stop based on the Collective Knowledge Doctrine and denied the motion to suppress.

She appealed and the Court of Appeals reversed, noting that since Sgt. Jenkins did not actually rely on the information, it could not support the stop. The Commonwealth appealed.

ISSUE: May collective knowledge provide justification for a stop?

HOLDING: Yes

DISCUSSION: The Court agreed that collective knowledge can be used to create reasonable suspicion for a stop. The Court noted that despite what Jenkins said, he was acting specifically because of the information shared by Det. Shoemaker. As such, Jenkins had reasonable suspicion and suppression was unnecessary.

The Court reversed the Kentucky Court of Appeals and remanded the case.

Com. v. Smith, 542 S.W.3d 276 (Ky. 2018)

FACTS: Det. Qualls (Franklin County SO) had been surveilling Smith for some weeks, trying to corroborate tips that he was trafficking in cocaine at a local bar. One night, he followed Smith and observed a brief interaction with a resident of his apartment complex, and then watched him switch cars. Eventually, Det. Qualls spotted Smith make an unsignaled turn. He did not make the stop, since he was in an unmarked car, but coordinated with Officer Eaton and his K9 to make the stop. Smith denied there was drugs in his car and Eaton ran his drug dog around the car. The dog alerted and Eaton had Smith get out. He found seven grams of cocaine hidden in the car and arrested Smith. Almost $4300 in cash was in Smith's wallet. Some eight minutes elapsed.

Smith was charged with trafficking and appealed the traffic stop, arguing that Eaton did not see the traffic violation. The trial court agreed that the only valid basis to make a stop was the turn signal violation, and Eaton did not witness that. It agreed that the sniff extended the stop impermissibly. The court suppressed the cocaine and cash.

The Commonwealth appealed the suppression order. The Court of Appeals agreed that the collective knowledge rule permitted Eaton's reliance on Quall's observation, so the stop was justified. However, it agreed the sniff improperly extended the scope of the stop. The Commonwealth sough discretionary review.

ISSUE: May collective knowledge provide justification for a stop?

HOLDING: Yes

DISCUSSION: The Court upheld the collective knowledge doctrine in making the stop.[7] It agreed that an "arresting officer is entitled to act on the strength of the knowledge communicated form a fellow officer and he may assume its reliability provided he is not otherwise aware of circumstances sufficient to materially impeach the information received." However, it acknowledge that even a valid traffic stop, if unduly prolonged, can become

[7] See Lamb v. Com., 510 S.W.3d 316 (Ky. 2017).

unlawful. Eaton "did none of the routine matters associated with a traffic stop, including the issuance of a citation, while he conducted the sniff search." Although he was still acting within an expected time frame for such activities, he "conducted the sniff search *instead* of conducting the usual procedures incidental to a routine traffic stop." He "seemingly abandoned the legitimate purpose of issuing a traffic citation" as he immediately launched into asking about drugs and implementing a dog sniff. Normally, the court would look at extending the stop, but in this case, the legitimate purpose for the stop never got started. He "did nothing to advance" the mission of a traffic stop.

The Court also addressed the Commonwealth's argument the two had a reasonable suspicion there were drugs in the car and the Ccourt agreed that was the case here. However, on the day in question, they had nothing beyond Quall's observations and Smith's prior record, and that was not enough. (His nervousness during the stop was immaterial, as well, as that occurred after the stop, of course.) The Court noted that since his parole status was not raised early enough in the proceedings, it could not be used to justify the stop either.

The Court upheld the suppression.

Nix v. Com., 2018 WL 1417633 2017-(Ky. 2018)

FACTS: In 2015, Nix was placed on probation, with one of his conditions being that he not be involved in "scrapping." Believing he would violate that, his probation officer asked local law enforcement to keep an eye out for him doing so. On January 2, 2016, Officer Waters (Lebanon Junction PD) spotted Nix pulling a load of old metal. The vehicle Nix was driving did not display a license plate, so Officer Waters made a traffic stop. He then spotted the plate, which was not properly displayed. Officer McHargue (Probation & Parole) arrived and Nix was asked out of his vehicle. Ultimately, Nix was arrested for violating his probation condition. During a search of the vehicle, a quantity of methamphetamine was found. He was charged with drug trafficking and related offenses as well.

Nix was convicted of all charges, and appealed.

ISSUE: May a minor offense justify a traffic stop?

HOLDING: Yes

DISCUSSION: The Court reviewed the trial court's finding concerning the evidence. Waters testified about the plate and there was confusion as to whom had spotted a sword and several empty alcohol beverage containers during the initial interaction. Waters testified that he saw no contraband, however, until McHargue located them.

The Court agreed that Waters was justified in making the stop based on reasonable suspicion that Nix was violating his probation. Nix had also agreed to "cooperate with a peace officer working at the direction of a probation officer." He had agreed to a warrantless search, as

well, on reasonable suspicion. Even if the stop was based on a suspicion beyond the license plate, that was permitted as well.

The Court agreed that the extension of the stop was justified based upon the development of his suspicions and the knowledge he received from Office McHargue. The vehicle search was also "constitutionally sound" – based on his probationer status.

The Court also upheld the information of his prior probation for scrapping, to explain why Officer McHargue was involved. The court introduced only the bare minimum of information to explain the circumstances of the stop and that the information was "inextricably intertwined" with the case at bar.[8]

On an unrelated note, the court also agreed that it was proper to allow Captain Halbleib, of the local drug task force, to testify as an expert witness concerning the drugs.

The court upheld Nix's convictions.

Chambers v. Com., 2018 WL 296985 (Ky. App. 2018)

FACTS: Officer Adkisson (Cold Spring PD) noticed a vehicle swerving over the yellow center line on US 27 several times. He ran the plate and received an insurance verification transmissions. He made a traffic stop to determine the status of the driver and their insurance. He learned that Johnson was driving, and he denied having his OL, but provided identifying information. (There was conflict as to whether proof of insurance was provided.) He questioned both Johnson and Chambers, the passenger, about the reason for the trip and they agreed that they were looking for tires. Adkisson asked Chambers if he'd stopped him for a drug stop before and Chambers denied it.

Adkisson had Johnson get out and noted track marks. He told Johnson if there was anything in the vehicle, he would only get a citation and Johnson admitted to having a syringe. He posed the same question to Chambers, who also admitted to a syringe and heroin. The officer located the items. Johnson was verified to be a licensed driver. Both men were cited and released, with the time lapse being about 50 minutes.

Chambers moved to suppress the evidence, arguing the roadside stop was too long. The trial court denied the motion. Chambers took a conditional guilty plea and appealed.

ISSUE: If officers learn of a confirmed violation during a traffic stop, may that extend the stop?

HOLDING: Yes

[8] Major v. Com., 177 S.W.3d 700 (Ky. 2005).

DISCUSSION: Chambers argued that the stop was unduly lengthened when the officer began questioning them. The Court noted that "mere minutes into the stop," the officer confirmed that Johnson did not have a license in his possession, another violation. The track marks and the fact that the officer recognized Chambers, "taken in concert," developed reasonable suspicion of criminal activity of drug and/or paraphernalia possession." Writing each citation took additional time.

This added to the erratic driving and the admissions of both parties was more than enough to extend the stop long enough to justify additional questioning.

The Court upheld the plea.

Traft v. Com., 539 S.W.3d 647 (Ky. 2018)

FACTS: On the day in question, Traft and Deputy Schepis (Boone County SO) passed each other during the early morning hours. Deputy Schepis was driving a cruiser equipped with the equipment to read license plates and provide information as to the vehicle and registered owner. He quickly learned that Traft, the registered owner, had an active warrant. Schepis followed and made a traffic stop solely on the license plate reader information.

Once he had the vehicle stopped, Deputy Schepis determined that Traft was intoxicated. He was arrested for DUI and for the outstanding warrant. At trial, Traft moved to suppress the traffic stop, arguing that his right to privacy was violated. When that was denied, he took a conditional guilty plea and appealed. Both the Boone Circuit Court and the Kentucky Court of Appeals affirmed. He then appealed to the Kentucky Supreme Court.

ISSUE: May an officer make a traffic stop when a license plate reader indicates that the registered owner of the vehicle has a warrant?

HOLDING: Yes

DISCUSSION: Traft argued that the reading of his license plate, in full view of the public, violated the Fourth Amendment. The Court noted that Traft could have no reasonable expectation of privacy in the license plate, "either subjectively or objectively." It was on the exterior of his car, while driving on a public street. As quoted in U.S. v. Ellison[9]:

> No argument can be made that a motorist seeks to keep the information on his license plate private. The very purpose of a license plate number, like that of a Vehicle Identification Number, ' is to provide identifying information 'to law enforcement officials and others. The reasoning in [New York v.] Class,[10] vis-a-vis Vehicle Identification Numbers applies with equal force to license plates: "[B]ecause of the

[9] 462 F.3d 557 (6th Cir. 2006).
[10] 475 U.S. 106 (1986).

> important role played by the [license plate] in the pervasive governmental regulation of the automobile and the efforts by the Federal Government to ensure that the [license plate] is placed in plain view," a motorist can have no reasonable expectation of privacy in the information contained on it.

Further, the information that the deputy accessed through his reader was public record, information that any member of the general public could obtain, and in fact, was an order directed to peace officers to take him into custody. As such, it "defies logic" that officers should be prohibited from having it. He would have gotten the same information had he asked dispatch to run the plate, and the "mere use of the technology" makes no difference.

The Court assessed Traft's argument that the deputy took no steps to confirm who was driving before he made the stop. The Court agreed that the appropriate standard was "whether Schepis had an articulable and reasonable suspicion (not probable cause) when he pulled Traft over." Although he did not know who was driving, the Court held "that the fact that the owner of the vehicle was subject to seizure for violation of law creates an articulable and reasonable suspicion for an officer to initiate a traffic stop. This was not a case of a "snooping deputy'' harassing a law-abiding citizen, as Traft argues. Rather, it was a case of an officer carrying out his sworn duty and abiding by the terms of a warrant issued by a court of this Commonwealth."

The Court affirmed the District Court's denial of the suppression motion and upheld Traft's guilty plea.

SEARCH & SEIZURE – ABANDONED PROPERTY

White v. Com., 544 S.W.3d 125 (Ky. 2017)

FACTS: In 1983, Armstrong was murdered in Louisville. Although White was among the suspects, the case went unsolved in a DNA link was made to White. LMPD obtained his DNA when an officer made a valid traffic stop and was able to collect a discarded cigar. He was convicted of rape and murder in 2007. He was sentenced to death, and appealed.

ISSUE: Is collecting DNA from an abandoned item lawful?

HOLDING: Yes

DISCUSSION: Among myriad issues, White objected to the way his DNA was obtained. The Court agreed that the stop, in which White was a passenger, was valid, and that removing him from the car and frisking him (which caused him to put down the cigar) was lawful. The cigar was abandoned and thus properly collected.

There were also questions raised about the evidence, which included the cigar and underwear cuttings. The Court agreed that an unbroken chain of custody is not critical.[11] Any break goes to the weight, not the admissibility, of the evidence.[12] The Court reviewed the long history of the underwear cuttings, from handling by the local police to the crime lab, and then to another laboratory. Eventually, some of the cuttings were returned to LMPD for storage. The Court agreed there was confusion about how the cuttings were transported between labs and the local police, but that there was no indication the evidence was mishandled in any way. The same issue occurred with the rape kit, and the court agreed that the deficiencies involved careless record keeping, but no indication of tampering of misidentification. Further, due to the long passage of time, the detective and the medical examiner had died before trial, but their successors properly testified.

After ruling on numerous other issues, the Court upheld his conviction and sentence.

INTERROGATION

Esper v. Com., 2018 WL 1320127 (Ky. 2018)

FACTS: Esper was the suspect in the sexual assault of a young girl. As the girl had a sexually transmitted disease, all of the men in the household were tested. Only Esper, her uncle, tested positive for the same strain of the disease the girl contracted. He was brought to the station and given Miranda, which he waived. He denied sexual contact and then admitted multiple acts of rape.

He accepted the offer to write a letter of apology to the victim and at the end, said, he would accept any punishment. That letter was read by a detective to the jury. He moved for suppression of the recorded interrogation, which was denied.

Esper was convicted and appealed.

ISSUE: Is misleading a subject about the consequences of their actions permitted?

HOLDING: Yes (but see discussion)

DISCUSSION: The Court agreed that the interview lasted some two hours, was fully recorded and that the door to the room remained unlocked. Esper was offered food, drink, cigarettes and bathroom breaks. He never asked to leave or for an attorney. The detective did falsely say he hadn't received the test results as yet, but he was using that as a tactic to allow him to leave the room for brief intervals to "call the doctor." That approach was intended to give Esper the chance to think about the situation. When he finally told him that he had tested

[11] Thomas v. Com., 153 S.W.3d 772 (Ky. 2004).
[12] McKinney v. Com., 60 S.W.3d 499 (Ky. 2001).

positive, the detective told him that he was likely going to jail, but it would be a chance to put his side on the record.

The Court reviewed the entire exchange and agreed that a ruse did not render the confession involuntary or coerced. He argued that the detective "unfairly minimized the crime and downplayed the potential penalty, thereby coercing him to confess." The Court agreed that it was properly admitted.

The Court also agreed that reading the letter in its entirety was also proper. The Court upheld the conviction,

NOTE: *This case included a strong dissent objecting to the way the interrogation was committed, suggesting that the effect of Miranda was vitiated by the assurances that confessing would lead to a lesser sentence.*

Shively v. Com., 542 S.W.3d 255 (Ky. 2018)

FACTS: Shively was charged with an Attempt - Murder and other charges as a result of a shooting in Louisville. The victim identified him from a photo array, and was familiar with him from contact prior to the shooting. He was arrested several weeks later and waived his right to remain silent, giving a statement. He was convicted and appealed.

ISSUE: Is simply talking to a suspect interrogation?

HOLDING: No

DISCUSSION: Shively argued that his statement was induced, coerced and involuntary. When interviewed, he asked to talk to a particular officer, and provided that officer with unrelated information. They discussed the crime and the officer told him that he was putting his family at risk by his actions, and that there was a "hit" out on him. He was given Miranda by the investigator and he provided a lengthy statement.

The Court agreed the first interaction was not an interrogation, and that in fact, the officer only told him to be honest and assured him that they were trying to protect his family. He made no incriminating responses to that officer. He continued to deny having any direct involvement with the shooting at bar. The Court agreed that the initial interaction was not coercive and upheld the denial of the suppression of the later interrogation.

> Shively also moved for a mistrial. Specifically, Reccius testified that Appellant.told her he was not the perpetrator, but that he had seen two people walking across the field in question when he was at his mother's house on the day of the shooting. The Commonwealth asked Reedus "What else did [Shively] say about seeing those two individuals?" Reccius responded: I think at one point in the conversation, it was two individuals that turned into three. Umm. I do remember him saying something about

he heard two shots. And that at one point in the conversation, I believe he told one detective that was in the interview with me that he didn't see good far away. So, I was· getting mixed signals on-I mean, clearly he was trying to hide something from me.

The Commonwealth argued that Reccius's comments were made in the context of her explanation of why she had conducted her investigation in a particular way and why she had moved from one subject to another in questioning Appellant. The trial court denied Appellant's motion for a mistrial and his · request for the jury to be admonished that a witness cannot "give an opinion about whether someone is being truthful or not."

We have held, "it is generally improper for a witness to characterize the testimony of another witness a~ 'lying' or otherwise."[13] In Moss v. Commonwealth, this Court quoted a decision from a sister state in reaching our holding: "A witness's opinion about the truth of the testimony of another witness is not I permitted. Neither expert nor lay witnesses may testify that another witness or a defendant is lying or faking. That determination is within the exclusive province of the jury."[14] Here, the trial court~ stated that Reccius's comment that she was getting conflicting information from Appellant was not tantamount to saying Appellant was lying during the interrogation. We note that "hiding something'' and "sending mixed signals" are not necessarily an -indication that someone is "lying." A person can "hide something" by omission or by avoiding the subject in controversy. While Reccius's testimony may have indicated~ that Appellant was hiding things during the interrogation, she testified neither that "people who hide things are often lying," nor that she "thought Appellant was lying because he was hiding things from her." She was testifying in the context· of her investigation about her investigatory techniques and why her questions shifted. Simply put, she did not characterize Appellant's statements as lies or opine that he was lying. She also never gave an opinion, either, as to whether he was guilty or innocent in the shooting.

The Court noted that Ordway v. Commonwealth, in which it held: "the determination of an individual's guilt or innocence must be based upon the evidence of the particular act in question;. it cannot be extrapolated from an opinion, that his behavior after the event comports with some standardized perception of how the 'typical' suspect behaves."[15] Again, this simply inapplicable to the case at bar. Here, based upon Reccius's interview with Shively, the detective testified that she was getting mixed signals and that Shively was trying to hide something. She did not testify that Shively behaved in a way that guilty people usually behave. Rather, she testified as to the manner in which Shively's story changed and her belief that he

[13] Lanham v. Com., 171 S.W.3d 14 (Ky. 2005)
[14] 949 S.W.2d 579 (Ky. 1997) (quoting State v. James, 557 A.2d 471 (R.I.1989)).
[15] 391 S.W.3d 762 (Ky. 2013)

was hiding something from her based upon those changes. She linked his behavior neither to his guilt, nor to the behavior typical of guilty parties.

Further, her testimony was made in the context of "explaining her investigatory techniques and why she shifted her questioning of [Shively] from one subject to another during the interview. She made no comment on her opinion as to [Shively's] guilt or innocence during the course of her testimony."

The Court affirmed his convictions.

Shoulders v. Com., 542 S.W.3d 255 (Ky 2018)

FACTS: On July 4, 2015, Shoulders called 911 to report he'd shot his wife at their Louisville home. Responders found Shoulders intoxicated and shouting profanities. His wife was deceased. Shoulders was arrested and booked after about two hours. He was not questioned after he requested counsel. He complained that he was not transferred to the jail quickly enough and that he was cold. He continued his "drunken tirade" and without prompting, he described the "deadly fight" with his wife. He destroyed property in the room where he was being held and threatened to kill one of the officers.

Ultimately he was indicted with Murder and other charges. He was convicted and appealed.

ISSUE: Is a person not being interrogated entitled to an attorney?

HOLDING: No (not at the outset)

DISCUSSION: Shoulders admitted that while he told police during the 911 call that he'd "drunkenly shot his wife," that he lacked the mental state for murder. He objected to the introduction of the video recording of him destroying the room, threatening to kill officers and speaking about his motive, infidelity. The Court agreed that under KRE 401 and 403, this was relevant evidence before the jury. Also, although he was not provided with defense counsel upon request, he was also not questioned, and "Miranda safeguards only come into play if the police engaged in express questioning's 'functional equivalent.'" Temporary detention in an interview room was not coercive, nor reasonably likely to evoke an incriminating response from a suspect. Further, introduction of his character under KRE 404(a) and Prior Bad Acts under (b) are admissible. (Some of the evidence include testimony that Shoulder's had previous pointed a gun at his wife and had threatened her with violence, and had been called a "mean, nasty drunk.")

The Court upheld his conviction.

SUSPECT IDENTIFICATION

Magee v. Com., 2018 WL 898143 (Ky. 2018)

FACTS: On the day in question, Det. Brislin (Lexington PD) was dispatched to an apartment where a subject had been fatally shot. An eyewitness claimed to have seen the shooter enter a specific apartment following the homicide. Det. Brislin obtained Magee's name from the occupant, Magee's sister, and prepared a photopak for the witness.

The witness explained the circumstances of the shooting and that she'd seen the individual around the apartment complex previously. She immediately identified the photo and indicated she was positive. Magee was indicted on Murder and related charges, and moved to suppress the photo identification. That was denied, with the trial court determining it was a proper array, even though the photos were not uniformly oriented. Under Neil v. Biggers, the Court agreed the witness had ample opportunity to view him, was at a high degree of attentiveness, was positive and was shown the array within a reasonable time after the crime.[16]

Magee took an amended conditional plea of manslaughter and then appealed

ISSUE: Are photos of a similar style, of individuals of similar appearance, sufficient for a photo array?

HOLDING: Yes

DISCUSSION: In an unduly suggestive assessment, the Court looked to the Biggers' factors. The Court agreed that the photos were all of similarly situated subjects, with similar faces and hair. They were all of a similar style, being all OL photos. The only real difference was that they were oriented differently, half and half. The Court agree that although the eyewitness's pre-identification could have been more detailed, it was sufficient, and she expressed total confidence in her identification.

The Court upheld his plea.

TRIAL PROCEDURE / EVIDENCE

TRIAL PROCEDURE / EVIDENCE – STATUTES OF LIMITATION

McAlpin v. Com., 2018 WL 565823 (Ky. App. 2018)

[16] 409 U.S. 188 (1972)

FACTS: On February 10, 2011, LMPD responded to assist a probation officer seeking help in finding Durham. Durham and McAlpin shared a child and she occasionally lived at his apartment. When they found her there, trying to leave, she was detained. LMPD officers searched the apartment, finding Suboxone and drug paraphernalia. Koger and Duerr arrived during the search and admitted being heroin addicts. Nothing was found on either of them, but Koger admitted laundry in the apartment belonged to him.

McAlpin returned and was found to have almost $1,000 in cash on his person, but nothing else. He was taken into a bedroom and questioned. Although McAlpin claimed he was handcuffed, the detective denied having done so. McAlpin admitted to an opiate addiction, but denied heroin.

Some three years later, he was charged with drug paraphernalia and possession of heroin. He was convicted and appealed.

ISSUE: Must a misdemeanor offense prosecution be initiated within a year?

HOLDING: Yes

DISCUSSION: McAlpin argued that the possession of drug paraphernalia was a misdemeanor and that the proceeding was initiated more than a year after the crime. The Court agreed that was improper and reversed that conviction.

With respect to the heroin possession charge, McAlpin argued that there was no evidence that any of the heroin (residue on spoons and the like) belonged to him, as he wasn't present at the time. The Court noted the contraband was found in his apartment, which he shared with Durham and their child. The Court agreed that the location of the items, in a medicine cabinet and in a bedroom drawer, were sufficiently connected to McAlpin to be used to show constructive possession of the items.

With respect to the interrogation, McAlpin argued he was in custody and that he was not given Miranda before he made certain admissions. The Court noted that "In order to determine if someone is in custody, "the ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."[17] "A reviewing court must be careful to use an objective standard in determining whether a person was in custody because 'the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.'"[18]

[17] Stansbury v. California, 511 U.S. 318 (1994) (quoting California v. Beheler, 463 U.S. 1121 (1983)).
[18] Beckham v. Com., 248 S.W.3d 547 (Ky. 2008) (quoting Stansbury, 511 U.S. at 323).

Several factors have been identified by the United States Supreme Court that would suggest when a person is in custody. Those factors are: "the threatening presence of several officers, the display of a weapon by an officer, the physical touching of the person of the suspect, and the use of language or tone of voice indicating that compliance with the officer's request might be compelled."[19]

In addition to the Mendenhall factors, in Smith v. Commonwealth,[20] the Kentucky Supreme Court identified additional factors to consider when determining custody, those factors are as follows:

> (1) the purpose of the questioning; (2) whether the place of the questioning was hostile or coercive; (3) the length of the questioning; and (4) other indicia of custody such as whether the suspect was informed at the time that the questioning was voluntary or that the suspect was free to leave or to request the officers to do so, whether the suspect possessed unrestrained freedom of movement during questioning, and whether the suspect initiated contact with the police or voluntarily admitted the officers into the residence and acquiesced to their requests to answer some questions.

The Court did not agreed, however, that he was clearly "in custody" at the time. There was dispute about the handcuffs, and there was no evidence that the officers acted aggressively toward him, or prohibited him from leaving. He saw holstered weapons, of course. The detective agreed that he might have told him to give a "good reason" not to be taken to jail, but noted that McAlpin was eventually allowed to leave. Further, the only admission was that he was a drug addict trying to get clean (hence the Suboxone) and that was brought to the jury in other evidence.

The Court reversed the drug paraphernalia charge, but upheld everything else.

TRIAL PROCEDURE / EVIDENCE – CELL PHONE

Charles v. Com., 2018 WL 898216 (Ky. 2018)

FACTS: During their investigation into the disappearance of Goldia Massey, in Fayette County, police determined she'd been seen with Charles. They learned that Charles was ripping up carpet at his home. Officers obtained a warrant for his home and both cell phones (his and Massey's). During the ensuing months, body parts washed up from the Kentucky River that were determined to be Massey's. No cause of death was determined but it was learned that a saw was used to dismember her body.

[19] U.S. v. Mendenhall, 446 U.S. 544 (1980).
[20] 312 S.W.3d 353 (Ky. 2010).

Upon searching Charles' home, officers used Bluestar to detect blood in the house. What was found was tested and ultimately, some of the swabs matched the victim. (Charles emphasized that her blood would not be found in his home, but backtracked and stated she'd "fallen down drunk" in his home, to account for the blood.) The cell tower records indicated that both phones had been signaling off the same towers until the night Massey went missing and ultimately, his was discovered to be signaling near the river.

Charles was convicted and appealed.

ISSUE: Is an expert needed to testify as to historical cell phone data?

HOLDING: Yes

DISCUSSION: Charles argued that the testing performed on the blood was presumptive, which was true. However, the lab technician noted she did confirmatory testing when there was a sufficient amount. Of those presumptive blood swabs, all but one did test positive as Massey's DNA, however. The Court agreed that while the process wasn't foolproof, it was highly reliable, and showed some type of trauma had occurred to Massey in Charles' home

The Court noted Bluestar was property used, and the detective that testified about it had sufficient knowledge to do so. It agreed that perhaps, this should have been treated as an expert process, with the appropriate proof being introduced under Daubert, but the defense did not make the necessary objection. The Court also agreed that photo enhancement of pictures of the Bluestar reaction were not wrong, but that the alteration should have been made clear to the defense. The Court upheld the admission of the photos, however, under KRE 901.

The Court addressed the issue of the cell phone tower data. At a pretrial hearing, an officer witness testified in detail about how cell phone location pinging was done, although a formal Daubert hearing was not done. He was simply explaining what the data provided by the cell company meant, as, in effect, a "technician of the records." Ultimately, the Commonwealth did request he be considered an expert witness, and based upon the prior hearing, the Court agreed.

The Court agreed that interpreting the records was "technical knowledge that requires an expert witness to explain." However, the Court agreed, he was qualified as an expert. Charles was given the opportunity to object and did not do so. Based on the record, he was qualified to testify. The Court agreed that "the admission of historical cell-site evidence is a matter to be assessed carefully."[21] However, here, as in Holbrook, the "testimony was relevant and probative." Although Defense counsel questioned Sgt. Richardson's lack of ability to answer specific questions she posed, this is a matter of weight rather than admissibility. An expert must not be infallible to be qualified; based on the information before it, this was a matter

[21] Holbrook v. Com., 525 S.W.3d 73 (2017).

soundly in the trial court's discretion. We still caution trial courts to carefully assess the nature of this proffered evidence-both the qualifications of the expert and the reliability of the evidence."

The Court upheld Charles' conviction.

TRIAL PROCEDURE / EVIDENCE – TESTIMONY

Gaddie v. Com., 2018 WL 1224664 (Ky. App. 2018)

FACTS: Gaddie and Fields went to Gist's home, where Gist lived with her daughter. Gaddie and Gist were in a relationship, but Gaddie became disruptive and Gist told Gaddie to leave. He did so, but pounded on her doors and windows and removed a window conditioner as well. He climbed through that window, with a revolver and a machete, He threated to kill Gist, her daughter and her animals, and to burn the house. Gist's daughter called 911.

Deputy Reneer (Butler County SO) arrived and saw Gaddie emerging from the fenced in yard. He found a gun nearby, hidden under a plank.

Gaddie was charged with Burglary, Tampering and Terroristic Threatening. Gist, however, had been separately charged with perjury. The Court did not allow questions about that in the subsequent trial, but she did testify about the charges under avowal. Gaddie was convicted and attempts on his charges. He appealed.

ISSUE: May a witness be questioned about prior perjury charges?

HOLDING: Yes (but discretionary)

DISCUSSION; Gaddie argued he should have been allowed to question Gist on her perjury indictment. The Court noted that the judge had discretion under KRE 608(b) and upheld the trial court's decision. With respect to Tampering, the Court agreed that the deputy had to search for the gun and that Gaddie had claimed he did not have one. He also found three knives and a holster, and a cell phone charger, all indicating an attempt to hide incriminating items.

Gaddie's conviction were upheld.

Slappy v. Com., 2018 WL 1417355 (Ky. 2018)

FACTS: In the summer of 2016, Det. Shown (Hopkinsville PD) investigated four related burglaries. Shown recognized Slappy in one of the videos, and believed he recognized him in another. He was charged and convicted of the first one, but acquitted of the other three. During the trial, Shown was asked "what happened after he recognized" Slappy, he initiated warrants, but he was detained soon thereafter. He stated that when brought to the station,

"he decided he wanted a lawyer so there wasn't really much to the interview." The defense did not object and Slappy was convicted. He appealed.

ISSUE: Does an incidental mention that suggests someone asked for an attorney warrant a mistrial?

HOLDING: No

DISCUSSION: Slappy argued that the comment on his invocation of counsel was sufficient to justify a mistrial. The Court noted that Slappy did not ask for a jury admonition at the time, which could be legally presumed to have cured the error. The Commonwealth did not deliberately elicit the reference, either, and that the underlying question was perfectly appropriate. The Court agreed the testimony was clearly improper and should not have been offered, but it was not enough to warrant a mistrial.

The Court upheld his conviction.

TRIAL PROCEDURE / EVIDENCE – RULE OF COMPLETENESS

Hall v. Com., 2018 WL 898651 (Ky. 2018)

FACTS: Jane (age 12) and Hall (an adult) were involved in a sexual encounter. Officer Embry was able to locate Hall, who was arrested in Breckinridge County. He admitted the encounter but denied knowing Jane's age or name. Later he admitted he knew she was underage and having received nude photos from her.

Hall was charged for Rape and a variety of related offenses. He was convicted and appealed.

ISSUE: Is it mandatory to play an entire recording in court?

HOLDING: No

DISCUSSION: During his trial, Hall argued that it was improper to not play the entire recording of the statement he made to Officer Embry. The trial court had ruled that the omitted portions were inadmissible. Normally, KRE 106, the "rule of completeness" mandates ""[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." However, that does not require the admission of the entire document, but only mandates the process be fair. In this case, the court agreed that Hall was not prejudiced by the redactions.

The Court affirmed Hall's conviction, but altered his sentence for unrelated reasons.

TRIAL PROCEDURE / EVIDENCE – PRIOR BAD ACTS

Com. v. Smith / Pike, 2018 WL 297279 (Ky. App. 2018)

FACTS: Smith and Pike were accused of sodomy and sexual abuse charges in Henry County, with M.F., Pike's daughter, as the victim. The abuse went for two years, while M.F. was 9-11 years old, and usually involved both. D.F., an older sister, testified as to oral and sexual contact as well, and alleged at least one rape, although that was not to be brought out during the trial. The crimes involved D.F. occurred in Jefferson County.

The Commonwealth sought to admit D.F.'s testimony under the modus operandi exception to the KRE 404(b), which was denied. The Commonwealth appealed.

ISSUE: Do similarities in a crime rise to a "signature crime?"

HOLDING: No

DISCUSSION: An interlocutory appeal by the state is permitted if it could be showed that if a defendant were to be acquitted, there would be no opportunity to seek an appeal. The Court agreed that one of the exceptions to the "general prohibition against the introduction of prior bad acts evidence; one of these exceptions is if the evidence is probative of *modus operandi*.[22]

> The *modus operandi* exception requires the facts surrounding the prior misconduct [to] be so strikingly similar to the charged offense as to create a reasonable probability that(1) the acts were committed by the same person, and/or (2) the acts were accompanied by the same *mens rea*.

The trial court had ruled that the actions taken with the older child were not "sufficiently strikingly similar" to those committed against M.F. The two were not of the same age when the abuse began, D.F. was 14. The Court agreed that there were certainly similarities, but that there was no "distinct pattern of abuse" that could rise to a "signature crime." M.F.'s abuse began with her mother only and did not include rape, while D.F. described threats and full intercourse, as well as drug use.

The Court agreed that the testimony was properly denied.

Gross v. Com., 2018 WL 297279 (Ky. 2018)

FACTS: Gross was involved in a romantic relationship with Stanley, in Boone County. In 2015, he suspected her of infidelity and bombarded her with messages. They met and while eating lunch, Gross punched Stanley twice. They fought and eventually, Gross scalped

[22] Newcomb v. Com., 410 S.W.3d 63 (Ky. 2013).

Stanley, removing almost half of her scalp and hair. He also broke her ribs. He dropped her off near her mother's home. She had multiple surgeries, but the damage to her scalp was irreparable and disfiguring. She did not initially report Gross had used a knife on her or ordered his dog to attack her. Gross, however, "recalled a different set of events," in which Stanley was the aggressor. Doctors later testified that the scalp injury was caused by a knife and not a dog bite, as Gross argued.

Also during the trial, the trial court admitted prior bad acts evidence, including text messages, Facebook messages and witness testimony.

Gross was convicted of Assault and appealed.

ISSUE: May messages between parties be introduced to show intent in a later crime?

HOLDING: Yes

DISCUSSION: Gross argued that the text and Facebook messages should have been suppressed. They reflected Stanley's fear, Gross's threats and physical abuse and an instance of choking. The Court reviewed the messages under the three-prong test described in Bell v. Commonwealth, which analyzes the proposed evidence in terms of (l) relevance, (2) probativeness, and (3) its prejudicial effect.[23] "With respect to relevance, ·the assessing court asks, is the evidence relevant 'for some purpose other than to prove the criminal disposition of the accused?" Aside from showing criminal propensity, that is, the extrinsic act evidence must bear materially on an element of the offense or on some other fact actually in dispute."[24]

The Court agreed that those messages were evidence of intent in the later assault. They were very close in time, as well, occurring mostly in the weeks leading up to the assault. It showed intent, rather than accident, and an escalation of violence.

After resolving several other issues, the Court upheld Gross's conviction.

Mark Fitz

FACTS: West was charged in 2014 for Sodomy and Sexual Abuse that allegedly occurred in 2010, the victim being his 11 year old granddaughter. Other charges were placed involving the same victim at later times. Prior to the trial, the Commonwealth indicated it would introduce "other bad act" evidence against West, in which he'd admitted to a family member that another child in the family had made similar accusations against him. The Commonwealth argued that the acts were "strikingly similar" to those in the present case. The evidence was admitted.

[23] 875 S.W.2d 882 (Ky. 1994), Driver V; Com., 361 S.W.3d 877 (Ky. 2012).
[24] Jenkins v. Com., 496 S·W.3d 435 (Ky. 2016)

Ultimately, he was convicted and appealed.

ISSUE: May evidence of prior bad acts be admitted?

HOLDING: It depends

DISCUSSION: The Court noted that in "Bell v. Commonwealth, the Supreme Court set forth a three-prong test a party must meet before evidence of other crimes or bad acts may be admitted. The proffered evidence must be relevant and probative, and its prejudice must not substantially outweigh it probativeness. Showing the evidence comes within KRE 404(b) is only the first step in deciding the admissibility of the evidence. Additionally, the trial court must weigh the evidence's probativeness against the danger of undue prejudice. Undue prejudice is most often found when there is a risk that the evidence 'might produce a decision grounded in emotion rather than reason' or where the evidence 'might be used for an improper purpose.']."[25]

In "Noel v. Com., for the rule of law that "evidence of similar acts [of sexual abuse] perpetrated against the same victim are almost always admissible for those reasons [to prove intent, plan or absence of mistake or accident].[26]" West contended that the separate incidents were not intertwined with or close in time to the incident for which he was convicted. Because his defense was that the touching did not happen at all, the disputed evidence the Commonwealth sought to introduce to show the touching was not accidental, was not probative.

The Court agreed that the evidence was properly placed before the jury, and that it was for the jury to determine the weight to be placed upon the evidence. His conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – TRIAL PROCEDURE

Conrad v. Com., 2018 WL 296983 (KY. App. 2018)

FACTS: Conrad shot Cox during an altercation in McCracken County. He was charged with Murder. He agreed to give an interview, while in custody, to a local TV station, in which he argued he was acting to defend his friend, McKendree, against Cox. He was convicted of Manslaughter 2nd and appealed.

ISSUE: Is every indication a person is in jail cause for a mistrial?

HOLDING: No

[25] Kentucky Evidence Law at § 2.15[3][b]; Wilson v. Com., 438 S.W.3d 345 (Ky. 2014).
[26] 76 S.W.3d 923 (Ky. 2002), Price v. Com., Ky., 31 S.W.3d 885 (2000).

DISCUSSION: During his trial, the Commonwealth introduced both the TV interview, which showed Conrad in a jail jumpsuit, and a recording of a telephone call from Conrad to McKendree. Both showed he was incarcerated at the time. The Court noted that although unfortunate, that simply showed that at some point, he was in custody. He did not appear in jail clothing or shackled during the trial itself.

Conrad also argued that introducing several statements he made to officers was prejudicial, but he was not characterized as lying, but simply illuminated inconsistencies, which was acceptable. (In some statements he emphasized he fired in self-defense, while in others, he focused on his desire to protect McKendree.)

The Court upheld his conviction.

TRIAL PROCEDURE / EVIDENCE – EXPERT WITNESSES

Com. v. Baldwin, 2018 WL 296979 (Ky. App. 2018)

FACTS: On November 27, 2013, Baldwin called Trimble County authorities to report he'd found Long's body. A blood-stained claw hammer was found at the scene, with Long's DNA. Another person's DNA was also found on it, however.

Baldwin was charged with Long's murder. Two years into the case, the KSP crime lab ran a TrueAllele test and determined that Baldwin was a "minor contributor" to the DNA on the hammer. He petitioned the court to have that information excluded, and requested the source code from the developer of the software.

At a hearing, the Commonwealth presented information that attested that other court's had accepted TrueAllele's results into evidence, despite challenges. The trial court agreed that Baldwin was correct, and entitled to a chance to subject the data collection to a Daubert analysis, and that there was insufficient time for the defense to dos so prior to the already scheduled trial date. The Commonwealth appealed.

ISSUE: Does some evidence require the use of an expert to be admitted?

HOLDING: Yes

DISCUSSION: The Commonwealth argued that it had presented the results in sufficient time (approximately three months) prior to the scheduled trial date to allow Baldwin to prepare and for a Daubert[27] hearing to have been held.

The Court noted:

[27] Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993).

> When one side proffers expert testimony of a scientific nature under KRE 702, Kentucky law compels the trial court to determine "whether the expert is proposing to testify to (1) scientific, technical, or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue."[28]
>
> If these two elements are met, then the proffered expert testimony is relevant, and the trial court must engage in an additional inquiry to determine if the testimony is also reliable. Id. This inquiry typically involves a Daubert hearing, unless the record is so complete a proper assessment of reliability can be made.[29]

Since the technology was new, and had never been recognized in Kentucky as yet, the responsibility would fall to the trial court to "fully assess whether TrueAllele evidence met the Daubert standard."

In other words, the circuit court had to specifically determine whether TrueAllele's methods had been (1) tested, (2) subjected to peer review, (3) found susceptible to a known or uncontrolled rate of error, and (4) accepted within the relevant scientific community.

The Court agreed that despite the concerns, Baldwin was still entitled to an opportunity to have a Daubert hearing and remanded the case for that purpose.

TRIAL PROCEDURE / EVIDENCE – RULE 7.24

Hilton v. Com. , 2018 WL 898306 (Ky. 2018)

FACTS: Hilton was involved in a fatal crash in Hardin County, which injured his passenger (his brother Kyle) and two occupants of another vehicle. One of the two occupants of the other vehicle died. Hilton admitted that he had been drinking and ran a stop sign to witnesses and EMS personnel. Deputy Cornett (Hardin County SO) obtained blood, which returned at a level nearly three times the legal limit.

Hilton was convicted of murder and related charges, and appealed.

ISSUE: Must exculpatory oral evidence be immediately disclosed to the defense?

HOLDING: Yes

DISCUSSION: Hilton argued that a witness statement concerning his admission of drinking to one of the witnesses should have been excluded. In preparing for trial, on week before,

[28] Goodyear Tire and Rubber Company, 11 S.W.3d 575 (2000) (citing KRE 104; quoting Daubert, 509 U.S. at 592).
[29] See Com. v. Christie, 98 S.W.3d 485 (Ky. 2002).

the Commonwealth had followed up with individuals on the 911 call sheets and only then learned that Hall, the witness, had been present at the scene and that Hilton had told him not to call 911. The Commonwealth immediately filed a supplemental discovery response. The defense argued that was dilatory and warranted exclusion. The trial court denied the motion, finding that under RCr 7.24, the prosecution did have a duty to "timely disclose any self-incriminating statements." However, the trial court agreed that the Commonwealth did not know of the statement and did not act in bad faith. The document was not in material the Commonwealth Attorney could exercise control, being instead in the 911 center. Those materials were also of public record and accessible to the defense.

The Court noted Hall was a private citizen, and not an agent of the Commonwealth. The court found no prejudice and upheld the denial.

After consideration of a number of other issues, the Court upheld Hilton's conviction and sentence.

TRIAL PROCEDURE / EVIDENCE – CHAIN OF CUSTODY

Pierce v. Com., 2018 WL 1224661 (Ky. App. 2017)

FACTS: On December 6, 2015, Deputy Bertram and Det. Hoover (Russell County SO) met with the Petersons, who was going to do a controlled buy from Pierce. The couple purchased the drugs and handed it over to Deputy Bertram. Pierce was indicted from trafficking. At trial, the process of handing the evidence was discussed, at each step, and KSP verified that the substance was methamphetamine. Pierce was convicted and appealed.

ISSUE: Is a perfect chain of custody required?

HOLDING: No

DISCUSSION: Pierce argued that the evidence wasn't mailed to the lab for a month and since no one directly witnessed Bertram sealing the bag, the break in the chain of custody made it invalid. The Court agreed that a perfect chain of custody is not necessary. "Any gaps go to the weight, rather than the admissibility of the evidence, and the proponent need only demonstrate a reasonable probability that it has not been altered in any material respect."[30]

The Court agreed that the evidence of the handling of the evidence was proper and that the chain of custody was sufficiently proven.

The Court upheld her conviction.

[30] Thomas v. Com., Ky. 153 S.W.3d 772 (Ky. 2004).

SHERIFFS

Lanham v. Elliott, 540 S.W.3d 353 (Ky. 2018)

FACTS: In 2012, Sheriff Elliott (Boyle County) terminated Lanham from his position as a deputy sheriff for alleged misconduct. The following year, Lanham filed suit, arguing that since the Sheriff did not follow the dictates of KRS 15.520 (the Police Officers' Bill of Rights) by providing a hearing and failing to advise him of his rights prior to questioning, Sheriff Elliott violated Lanham's due process rights. Sheriff Elliott responded that KRS 15.520 did not apply to the office and, because Boyle County lacked a merit board, deputies served at the will of the Sheriff. (He also argued that Lanham's claim was that he was, in part, terminated for hiring an attorney was without merit as "no public policy in Kentucky recognized a general legal right to obtain counsel in anticipation of civil proceedings. Lanham later also made a claim of age discrimination.)

The trial court ruled for Sheriff Elliott, under summary judgment, finding that KRS 15.520 did not apply to the sheriff's office. Lanham sought review before the Kentucky Court of Appeals. The appellate court addressed Lanham's argument that because KRS 15.420 provides definitions for the Kentucky Law Enforcement Foundation Program (KLEFP) funding which includes deputy sheriffs under the definition of "police officer," that sheriff's offices are included as "local units of government," and that KRS 15.520 applies to such agencies, Lanham was thus covered by the statute. Lanham further argued that the merit board argument was "simply inconsequential" to KRS 15.520.

The Court noted that the primary dispute in the case is the "proper interpretation and application of KRS 15.520 and KRS 70.030 (which indicates that deputies are at-will employees of the sheriff, if not protected by a merit board.) It noted that in 1998, when sheriff's offices were made eligible for KLEPF, KRS 70.030 was amended to provide that the office could request the funding, but was not required to establish a merit board.

The Court of Appeals noted:

> Taken separately, the provisions of KRS 15.520(4) and KRS 70.030(1) and (5) appear plain and straight forward. The ambiguity only arises when juxtaposing the two statutes. In KRS 70.030(1), the sheriff's authority to hire and terminate deputies is only circumscribed if a deputy sheriff merit board has been adopted in that county; whereas, KRS 15.520(4) mandates application of its due process procedures if the sheriff elects to receive funding from KLEFP.
>
> And, KRS 70.030(5) allows the sheriff to receive KLEFP funding without establishing a deputy sheriff merit board.

The resolve the conflict, the Court of Appeals looked at Pearce v. Univ. of Louisville[31] in which the Kentucky Supreme Court had held that KRS 15.520 should be accorded to have a "broad and expansive reach," and that the "the entire tone and tenor of KRS 15.520 suggests *uniformity* of due process protections to police officers all across the Commonwealth, irrespective of the urban or rural nature of the local community."

The Court of Appeals conclude that it interprets "KRS 15.520 as mandating that a sheriff is bound by the due process procedures therein if the sheriff has elected to receive KLEFP funding. Simply stated, KRS 15.520 is triggered by the sheriff's acceptance of KLEFP funds." The Court of Appeals agreed that the establishment, or lack of, a deputy sheriff merit board was immaterial.

The Court of Appeals placed no merit on the unlawful termination claim, finding no statutory right violated, and also dismissed several other claims on procedural grounds. The Kentucky Court of Appeals reversed the summary judgement as to the application of KRS 15.520 and the Sheriff appealed to the Kentucky Supreme Court.

ISSUE: Do the due process provisions of KRS 15.520 apply to Kentucky deputy sheriffs?

HOLDING: No, under the prior version of KRS 15.520. Yes, under the current version of KRS 15.520.

DISCUSSION: The Court began with a summary of the relevant statutes. KRS 70.030(1) provides that a Sheriff may terminate a deputy at will, except as KRS 70.260-.273 (the merit system provisions) applies. Boyle County, however, did not have a deputy sheriff merit board. Because of the date Lanham was terminated, an earlier version of KRS 15.520 was in effect as opposed to the version that is currently the law.

Under that version, the final provision in that statute applies the Bill of Rights only to "police officers." However, it does not define "police officer" in any applicable definition. As such, the Supreme Court held that sheriff's offices and police departments have "traditional differences" and a deputy sheriff is not a police officer under the law.

The Kentucky Supreme Court held that KRS 15.520 does not provide any due process rights to deputy sheriffs, although those in a county with a merit board will have due process rights under that body of law, and reversed the decision of the Kentucky Court of Appeals.

NOTE: *For the purposes of a full understanding of this case, the following history of KRS 15.520 and related statutes is provided.*

[31] 448 S.W.3d 746 (Ky. 2014).

KRS 15.520 (Police Officers' Bill of Rights) came into Kentucky law in 1980. It is important to note, for later interpretative purposes, that it was added to the end of KRS 15, which before the addition, ended at KRS 15.510. Unlike the usual language in the KRS, which generally applies definitions to the entire chapter in which it appears, then, as now, KRS 15.420, the definitional provisions state reads as follows: "[a]s used in KRS 15.410 to 15.510, unless the context otherwise requires." This, by default, excludes the definition from being applied in KRS 15.520. This was, in fact, noted by the Kentucky Supreme Court in its ruling. However, KRS 15.520 was statutorily linked to the prior sections, KRS 15.400-.510, which established the Kentucky Law Enforcement Program Fund in 1972, by its last provision, which applied the rights under KRS 15.520 to police officers participating in the KLEPF. When KRS 15.410 was enacted, however, participation in the fund was limited to full-time officers of "lawfully organized police department[s] of county or city governments." Participating agencies at that time specifically excluded sheriffs and deputy sheriffs among others, as well.

Only in 1998, when some elected sheriffs (those not already making the maximum Constitutional salary), deputy sheriffs and "state or public university officers" were made eligible for KLEPF were they also added to the definition of "police officer" in KRS 15.410. At the time the Boyle County case arose, and until 2015, the last provision in KRS 15.520 read: "(4) The provisions of this section shall apply only to police officers of local units of government who receive funds pursuant to KRS 15.410 through 15.992." As the Kentucky Revised Statues provided no definitions for either "police officers" or "local units of government" at the time that would apply to KRS 15.520.

Since the time of the events in this case, however, KRS 15.520 was dramatically amended, in 2015, to take in consideration court decisions in Pearce and Hill v. City of Washington,[32] specifically. Of note, Pearce involved a university officer, one of the categories of officers who initially was not eligible for KLEPF funding, but was only added in 1998, at the same time deputy sheriffs were added, and who certainly would not, but for the definition, normally be considered to be employed by a "local unit of government." However, the Court accepted that Pearce, as a university police officer, was entitled to the due process provided in KRS 15.520, although the crux of the case involved a different issue.

In addition, rather than eligibility under the statute being a substantive provision now, the meaning of "officer" in KRS 15.520 is now part of the definitions at the beginning of the actual statute. KRS 15.520 currently provides that "'[O]fficer' means a person employed as a full-time peace officer by a unit of government that receives funds under KRS 15.410 to 15.510 who has completed any officially established initial probationary period of employment lasting no longer than twelve (12) months not including, unless otherwise specified by the employing agency, any time the officer was employed and completing the basic training required by KRS 15.404." This also made a slight, but crucial change, with the word "local" and "police" being removed in KRS 15.520, although it remains as part of the definition in KRS 15.420. Under the general rules of statutory construction, if the law used two different words

[32] Same cite as Pearce.

or phrases, it intends to convey two different meanings, and if a word or phrase is undefined, the general "dictionary meaning" of the word or phrase controls. As such, arguably, "local unit of government" and "unit of government" mean different things.

On a related note, prior case law often conflated Kentucky merit law protections for deputy sheriffs, under KRS 70.030, with protections under 15.520, and requiring that in order to have any protections under the latter, a county must have enacted the former, and without that, deputies remain at will employees. (See Vincent v. Doolin[33] and Robinette v. Pike County Sheriff's Department,[34] among others.) Merit system agencies do, in fact, provide greater and / or more detailed protections, of course.

On a related note, Sheriffs must also be aware of the provisions of federal law that prohibit terminations based on "politics." Under Elrod v. Burns, 427 U.S. 347 (1976), the Court provided that "patronage dismissals, or the practice of discharging employees because they in some fashion support a political party other than the one supported by their employers, violates the First and Fourteenth Amendments to the U.S. Constitution."[35] However, appellate courts agree that is not a hard and fast rule, and that employees who are classified as "confidential" – who hold policymaking positions such as the Chief Deputy – are not protected by the Elrod rule. In Heggen v. Lee, the incoming Sheriff had declined to retain three deputies when he took office, all of whom had supported his opponent, the prior Sheriff, in the primary election. (Heggen defeated the incumbent at that time and was unopposed in the general election.) The three deputies filed suit under 42 U.S.C. §1983, arguing that their termination was unlawful. Lee argued that he had valid reasons to decline to rehire, the deputies, but in fact, many of the purported reasons came to light long after the termination. The District Court ruled against the Sheriff, who appealed. Ultimately, the Sixth Circuit agreed that a deputy sheriff who was not in a policymaking position was protected by Elrod, Branti v. Finkel[36] and / Hall v. Tollett,[37]and the case was returned to the lower court for further proceedings and evaluation. (Ultimately, the case was settled in favor of the deputy sheriffs.)

In conclusion, although the Kentucky Supreme Court ruled against Deputy Lanham in this case, the entire statutory landscape with respect to deputy sheriffs has changed, and terminations that occur now will be considered under the current version of KRS 15.520.

EMPLOYMENT

Turcotte v. City of Glasgow, 540 S.W.3d 353 (Ky. App. 2018)

[33] 2005 WL 928649 (Ky. App. 2003).
[34] 2006 WL 2328621 (Ky. App. 2006).
[35] 427 U.S. 347 (1976),
[36] 445 U.S. 507 (1980).
[37] 128 F.3d 418 (6th Cir. 1997).

FACTS: Turcotte became the chief of police for Glasgow in 2011, under Mayor Trautman. In 2014, Trautman lost the race and Doty became Mayor. Turcotte had resigned as chief a week prior to Doty's taking the office and became, instead, a command officer of the department. That meant that the three salaried command staff positions were filled but the chief of police position was vacant. Lt. Col. Duff, one of those three, became the interim chief when Doty took office. The other command officer was performing the duties of the position assigned to Turcotte, who was given no duties commensurate with his rank.

Turcotte filed suit, arguing a violation of KRS 95.450 and defamation, arguing that Interim Chief Duff made statements about him. The trial court denied all claims made by Turcotte and he appealed.

ISSUE: Does a promotion necessarily carry increased duties?

HOLDING: No

DISCUSSION: The Court agreed that the "only frank transfer of title or diminution in grade" was done at Turcotte's choice. His new position at the choice of the mayor did not carry with it inherent job duties and those tasks were already being handled by someone else. He was given a title only. In fact, he was unable to handle any duties as he was not present more than a few days for the few four months of 2015, as he was absent due to health issues and a family emergency. It was reasonably not to assign him tasks he was not available to perform.

The Court upheld the dismissal of the claims.

Hutchinson v. City of Independence, 2018 WL 297270 (Ky. App. 2018)

FACTS: While off duty, on May 9, 2014, Hutchinson, an Independence police officer, shoplifted an item from a local gun store. He later returned and claimed he'd purchased it several weeks before and asked for a refund. Upon checking and disproving that claim, the store reported it to the Florence PD, which reported it to the Independence PD.

Chief Butler ordered Hutchinson to come to the police station "ready for duty." When he arrived, the officer discovered his access code had been disabled. He was met by officers, searched, disarmed and escorted in to the chief's office. He was informed of the investigation by the Chief and cautioned about making any statement, and duly suspended. He was given a prepared retirement letter, and told to "sign this if you want to protect your retirement." He understood that to mean that if he was fired, he might lose the city's contributions and he immediately signed the letter.

Nothing further was done regarding the theft and no disciplinary proceedings ensued. On June 3, he attempted to rescind his resignation and denied a hearing pursuant to KRS 15.520. On June 4, he was charged with two misdemeanor counts regarding the theft which he resolved it by paying a fine and entering a diversion program.

On March 6, 2015, he filed suit, arguing his resignation had been given under duress. The City filed for summary judgement, which was duly granted in 2016. Hutchinson appealed.

ISSUE: Is telling an officer their job is in jeopardy due to misconduct coercion?

HOLDING: No

DISCUSSION: Hutchinson argued that his "resignation was unfairly coerced when he was called to Chief Butler's office." The Court agreed that suggesting that his position was in jeopardy did not constitute coercion when he had been caught on camera stealing was not coercion. He was properly called in before 24 hours had elapsed and resigned and as such, was not yet legally entitled to a written explanation for his suspension.

The Court upheld the summary judgement.

MISCELLANEOUS

Com. v. Cambron 546 S.W. 3d 556 (Ky App., 2018)

FACTS: Cambron was charged with the stabbing death of a 12-year-old boy in Jefferson County. He confessed, but claimed extenuating circumstances. During the pretrial process, the presiding judge entered more than 30 ex parte orders on behalf of the defense, specifically requiring records to be delivered under seal to the public defender's office – and to no one else. The Commonwealth was unaware of these orders. It was believed that based upon the dates of the orders, that the defense had communicated with the trial court on at least seven occasions without the knowledge of the prosecution. The orders included no rationale for the court's decisions.

One of the orders was directed to a LMPD investigative unit, which alerted the Commonwealth to its receipt. The Commonwealth moved to quash it and sought disclosure of the remaining orders that it discovered after searching CourtNet. The defense responded, noting that it was "common practice in Jefferson County and throughout the state" to do so, but provided yet more detail in an ex parte response to the judge.

The Commonwealth appealed.

ISSUE: Are ex parte discovery orders, without notice to the other side, lawful?

HOLDING: No (as a rule)

DISCUSSION: The Court of Appeals reviewed the process engaged in by the Jefferson County trial court. The trial court's reasoned that the orders expedited the production of records to

which the defense was entitled. (There was, in fact, no allegation that any records had been denied, however, specifically in this case.)

The Court noted that "quite simply, this case is about the proper way to seek records." There are "five long-standing and well-established" ways to do so, that have "worked well in a myriad of cases – both civil and criminal." The Court stated that this process is intended to "ensure all parties are aware of movement in the case and create a level playing field. When these options are ignored, justice is skewed and fairness eliminated." The Court agreed that there was no rule of criminal procedure that "authorizes a party to use a trial court's power to procure discovery without serving notice of those discovery efforts on opposing counsel" and in fact, the rules say exactly the opposite.

The Court emphasized: a basic tenet of the legal profession is ex parte communication between a judge and an attorney in a pending case is disfavored. It is only permitted in highly limited circumstances, none of which are present in this case, and specifically not when a ruling gains the requestor a "procedural or tactical advantage on a substantive matter or an issue on the merits." Nothing in the law authorized this process.

The Court engaged in an in-depth discussion of the unsupported claims of the defense as to the need for the process. It also noted that the trial judge chastised the LMPD for making the prosecution aware of the sealed order, and that had it not done so, "the trial court's habit of routinely acceding to cloak-and-dagger requests would not have been exposed to the light of day." By engaging in the practice, the defense counsel had "developed a secret ally" in the trial judge. The Court found it curious that the defense didn't simply procure orders in the usual way, which would include, if appropriate, asking the trial court to obtain the records and do an in camera review.

The Court noted that "Jefferson County attorneys are once again seeking to expand use of ex parte communications with a judge … is not surprising." Prior cases involved the Kentucky Supreme Court forbidding practices that had become common in Louisville. There was no indication that the records had been denied or that the agencies to which the orders were directed did not respond appropriately. (In fact, it noted that if time was of the essence, an Open Records request would be quicker and could be done without notice to the prosecution – although almost certainly, it would have been denied as the case was an active investigation and the prosecution would have been made aware of the request.)

The Court overturned the trial court's denial of the Commonwealth's motion to quash the orders and for the disclosure of other ex parte documents was reversed, and the case remanded to the trial court.

SIXTH CIRCUIT

FEDERAL CIVIL RIGHTS

U.S. v. Corder, 2018 WL 818046 (6th Cir. 2018)

FACTS: On October 22, 2014, Baize returned home to find Deputy Corder, Bullitt County SO, parked in his assigned space. Corder asked Corder to move, and the deputy said he would "move his car when he was ready." Baize told Corder to "fuck off" and the deputy asked him to repeat it; Baize did so. Baize acknowledge he raised his voice some, but was not yelling. No neighbor complained about the interaction. Baize walked into his home. Corder told him to stop, but Baize stated he did not hear him.

At that point, Corder turned on his body camera and knocked on the door. Baize opened the inner door, and Corder ordered him to come outside. Baize refused. After a verbal altercation, Corder reached inside and tried to pull him out, but Baize resisted. Corder went inside, grabbed and arrested Baize. Allen, a fellow deputy, arrived to assist. Corder eventually "tazed Baize into submission and completed the arrest."

Baize was charged with several misdemeanor. Baize was unable to post bond and spent two weeks in jail. The prosecutor and Baize's public defender entered into an agreement without Baize's knowledge, to dismiss the case with a stipulation of probable cause. He only learned about the dismissal when he arrived for a scheduled pretrial.

Corder was indicated under 18 U.S.C. §242 for a criminal violation of Baize's civil rights, with allegations of force and unlawful seizure. Corder was convicted and appealed.

ISSUE: Is a person already inside the house subject to hot pursuit?

HOLDING: No

DISCUSSION: Corder argued that the jury instructions improperly described Kentucky law. The Court noted that there was no indication that Baize met the elements for disorderly conduct nor did he meet the elements of fleeing and evading. At the time Baize allegedly "fled," there was no risk whatsoever of any harm, that did not occur until Corder initiated a physical altercation, inside the home itself. The Court also agreed that Baize was not in the threshold but actually inside the house. Although exigent circumstances and hot pursuit might apply if there was evidence at risk of destruction, that was not the case.

During his own testimony, Corder had claimed to be truthful and that, the Court agreed, opened the door to evidence of prior internal affairs investigations on Corder in years past, in which it was determined he had lied to investigators. The Court concluded that under

Brown v. U.S., the defendant's testimony about his own truthfulness had opened the door to such cross-examination.[38] In Brown, the Supreme Court established the general rule that a "voluntary witness," i.e., one who is not compelled to testify, such as defendant, "could not take the stand to testify in [his] own behalf and also claim the right to be free from cross-examination on matters raised by [his] own testimony on direct examination." "[T]he breadth of his waiver is determined by the scope of relevant cross-examination." The Court agreed that "although temporal remoteness reduces the probative value of the evidence, it does not eliminate it, and that probative value is bolstered by the similarities the older evidence has with the instant crime." The Court ruled it was admissible.

The Court affirmed Corder's conviction.

CONSTRUCTIVE POSSESSION

U.S. v. Ward, 2018 WL 1517180 (6th Cir. 2018)

FACTS: Jackson, TN, officers served a search warrant on the McKinnie residence. They focused on the room Ward occupied as an intermittent guest, finding a variety of pills totaling over 6,000 and packaging, along with a drug ledger and prepaid cell phones. Items specific to Ward were also found, including receipts, his "framed parole certificate," and his laptop. The McKinnies denied ownership of any of the items.

Ward was convicted of drug distribution, and appealed.

ISSUE: Is someone that is a regular guest constructively responsible for items found in the bedroom they occupy?

HOLDING: Yes

DISCUSSION: Ward argued that he did not constructively possess the pills in question, but the Court agreed that he had "recent dominion" over the bedroom. Nor was he just a "passing visitor," although he argued that the McKinnie's could have moved the drugs into the bedroom to divert suspicion. The court noted that he had the chance to present his theory to the jury, which it "clear rejected," and that was the proper role of the jury to decide.

The Court upheld his conviction.

[38] 356 U.S. 148 (1958).

SEARCH & SEIZURE

SEARCH & SEIZURE – SEARCH WARRANT

U.S. v. Curry, 2018 WL 721674 (6th Cir. 2018)

FACTS: After running away from a group home in Mt. Pleasant, Michigan, three girls happened upon Curry. He agreed to give them a ride to Detroit the next day and they spent the night at the home of Curry's friend. There, they met Pollard, Curry's girlfriend. Curry told the girls that he could "take care of them" in Detroit, "promising money, phones, jobs, and drugs." He had said they would be cooking and cleaning, but upon arrival, told them he would be their pimp. One of the girls, in particular, was distressed, but Curry told them they were "his" until they turned 18. He used his cell phone to take sexually explicit photos to share with clients.

Over the next few days, he physically and sexually assaulted all three girls, and forced two of them into prostitution. One finally escaped and the Michigan State Police entered the case. Eventually, the other two girls were found at a third party's home, where Curry had moved them after the first escaped. Curry's home was searched pursuant to a warrant and both he and Pollard were arrested.

Both state and federal authorities brought charges against Curry and others. A number of charges were made under federal law involving sex trafficking and child pornography. He was convicted and appealed.

ISSUE: Does the fact that a particular crime is one that could be considered to be ongoing mitigate a staleness argument?

HOLDING: Yes

DISCUSSION: Curry argued that the warrant for the home was based on stale information. The Court reviewed the four-factor test: "(1) the character of the crime (chance encounter in the night or regenerating conspiracy?), (2) the criminal (nomadic or entrenched?), (3) the thing to be seized (perishable and easily transferrable or of enduring utility to its holder?), and (4) the place to be searched (mere criminal forum of convenience or secure operational base?)."[39]

In this case, 64 days passed between the time the girls were rescued and the date the warrant was signed. Officers learned, among other things, that the girls had seen firearms and both Curry and Pollard were convicted felons. The crime in question, sex trafficking:

[39] U.S. v. Frechette, 583 F.3d 374 (6th Cir. 2009).

> …is not one of a chance encounter but rather that of an ongoing operation, interrupted in this case only by one girl's escape and the rescue of the other two. As for factors two and four, the place to be searched was defendant's residence, where he was entrenched, and which also served as the "home base" of the criminal activity. Though the girls were sent away from the house to turn "tricks," they resided with defendant at the residence and that's where the child pornography was created.
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> Finally, the things to be seized included one or more cellphones and computers from which law enforcement reasonably believed they would recover pornographic images of the girls and evidence of sex trafficking. Computer evidence has a particularly long life span; even after evidence is deleted by a user, it often can be recovered by law enforcement." There was no reason to believe most of the evidence wasn't still at the home.

After resolving other issues, the Court upheld his conviction.

U.S. v. Tagg, 886 F.3d 579 (6th Cir. 2018)

FACTS: This case revolves around the use of the "dark web" to distribute child pornography. Through the use of a web browser called Tor, clandestine sites can shield users from having an "online face" – the IP address - on the internet. It can also hide a website from search engines, which requires users to know the exact URL to find it. Such sites are "an island that cannot be found, except by those who already know where it is."

However, nothing is totally secret and there are ways to circumvent Tor's mask. In this case, the FBI gained access to the physical computer managing the website for Playpen, a site on the dark web, using a NIT warrant that places a digital bug into the fabric of the website. Using data collected, they sought individual warrants for identified users, which required the affidavit to describe the process. For Tagg, they specifically detailed his computer usage and what he was searching for with Playpen, which include child pornography. In the subsequent search, some 20,000 files of child pornography were found.

The trial court held the warrant to be invalid and would only satisfy probable cause if it could be shown he clicked on or opened a site with prohibited material. The U.S. appealed.

ISSUE: May probable cause be shown by a subject visiting a website that includes child pornography, even if that site also includes legal material?

HOLDING: Yes

DISCUSSION: The Court noted that probable cause "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." The Court agreed that the unique challenges posed by a child pornography case require a practical approach and noted that it had previously held that "visiting or subscribing to a website containing child

pornography creates a reasonable inference" that it will be found on the person's computer.[40] This is not changed simply because the website also includes legal material. The Court noted that if a person spends a large amount of money to access something, it would be expected that they would, in fact, make use of it.

In addition, since such material is usually accessed in the secrecy of one's own home, it is reasonable to believe that it would remain on electronic devices in that home. The Court agreed there was sufficient nexus.

The Court also addressed the specifics of the federal laws cited, and agreed that the warrant was improperly suppressed. The Court reversed the District Court's decision and remanded the case.

U.S. v. Castro, 881 F.3d 961 (6th Cir. 2018)

FACTS: A series of similar robberies occurred in Dallas, TX, during December, 2014. Police interrupted the last one and arrested a suspect, Olaya. In the process of a search of the car, they located a cell phone, and obtained a warrant to search it. An officer "reviewed the contents of the phone by hand." He took screen shots of potentially incriminating evidence, and then placed the phone in storage. The case became merged with a federal investigation and the FBI took charge of the phone, searching it again based on the original warrant.

Officers linked Castro as the organizer of the robberies. They traced a signal from a stolen cell phone to Castro's residence. They watched the house, searched it twice, and also searched her phone briefly on consent. They obtained a search warrant for Castro's two phones, finding incriminating evidence. The two warrants were essentially identical, only differentiated by the individual phone sought.

Both Olaya and Castro were charged under RICO and moved to suppress the cell phone searches. The trial court granted those motions and the prosecution appealed.

ISSUE: Must "evidence of a crime" be read in a commonsense way?

HOLDING: Yes

DISCUSSION: Castro argued that the particularly requirement was "flubbed" because it authorized a search of the phones for evidence of any crime, not just the robberies. The Court noted that authorizing a single crime, using "the" rather than "a" – would have carried its own problem – as there were multiple armed robberies involved. Further, reading the affidavit in its entirety made it clear that the warrants were focused on the robberies, and that language served as a "global modifier" to limit the search.

[40] U.S. v. Wagers, 452 F.3d 534 (6th Cir. 2006).

The Court looked to Andresen v. Maryland, as well, which indicated that the word crime could not be read in isolation, and that it should be read in a "commonsense contextual" way.[41] Although the last line was overreaching – and tacked on at the end, it did not invalidate the entire warrant. If necessary, any improper evidence seized, of which there was apparently none, could have simply been suppressed.

The Court also addressed the later search using the initial warrant. The Court noted that the federal officers were looking for evidence of the same underlying crime. Further, he never regained custody of the phone, so an additional search of the phone had no effect on his day to day activities, as it didn't cause a second deprivation.

The Court reversed the suppression rulings.

U.S. v. Courtney, 2018 WL 1341643 (6th Cir. 2018)

FACTS: In August 2016, an informant told Det. McKay (Cleveland PD) that Courtney was selling heroin from an apartment. He connected Courtney with the location with property records. They installed a GPS device to Courtney's truck, with a warrant. Officers observed a pattern of short visits by a number of people, while Courtney was there. He also engaged in hand-to-hand transactions and also made circuitous trips around the city. At various houses, he paid short visits. He spent the night at one of two other locations. Mail was found in the trash that tied him to the second address.

Officers obtained search warrants for all three locations, and all three were executed at the same time. A vast amount of drugs (heroin, fentanyl and cocaine) and other items were located, along with weapons. Courtney was stopped in his vehicle and when the officers learned of what had been found, he was arrested. He was taken to the apartment and in fact, his keys were used to lock the apartment. Two more warrants, for another empty apartment in the same building and for the truck, were obtained.

Courtney was charged with weapons and drug violations. He moved to suppress and was denied. He was convicted and appealed.

ISSUE: May various locations connected to drug trafficking be identified as being subject to search?

HOLDING: Yes

DISCUSSION: Courtney argued that the officers lacked sufficient probable cause to search the various locaitons. The Court agreed first that the apartment and his truck were clearly indicated as a likely location for drug trafficking. His odd trips to the two "home" locations

[41] 427 U.S. 463 (1976)

also justified probable cause that drugs would likely be there as well. The informant was also known to McKay for many years, and he corroborated the information provided as well.

Even though, the Court agreed, his initial seizure may have been unlawful, within five minutes it converted to a properly justified arrest. And since no evidence was obtained during those five minutes, the detention was harmless.

Courtney's conviction was affirmed.

U.S. v. Hines, 885 F.3d 919 (6th Cir. 2018)

FACTS: On December 15, 2015, Det. Evans (Louisville Metro PD) requested an affidavit to search a residence. The home was owned by Hines' mother, and in it, a CI had seen heroin. Another CI had been involved in drug trafficking from the home. He indicated he was always asked to meet Hines at that home. During a meet with the second CI, Hines left that address and proceed in an erratic way to the meeting site, driving in a way intended to evade a possible tail. Hines had been on the local DEA radar for many years and he had been connected to "kilogram quantity" transactions.

The officers obtained the warrant and executed it that same day. They seized several pounds of heroin and cocaine and a large quantity of cash. He was charged and argued for suppression.

The trial court upheld the suppression, find that the two CIs were not sufficiently proven in the warrant to be reliable, as the only information provided was conclusory. Further, because the officer that obtained it was the same one that executed it. The government appealed.

ISSUE: If an affidavit includes the basis of knowledge for an unnamed informant's information, is that sufficient?

HOLDING: Yes

DISCUSSION: The Court noted that while the affidavit did not name the informants or offer that they'd previously provided reliable information, it did describe the basis of knowledge for both. The Court noted that it did not "evaluate an informant's veracity, reliability, and basis of knowledge independently; more of one compensates for less of the others."[42] The court noted that was enough, but also addressed the corroboration, and the surveillance, performed. The Court noted that Hines did go to the meet site as described and that supported the rest of the CI's story, that the meet was to discuss a heroin shipment. Such specific nonobvious information was highly relevant in assessing a tip.

[42] U.S. v. Ferguson, 252 F.App'x 714 (6th Cir. 2007).

The Court agreed there was a specific, concrete nexus to support the warrant. With respect to the good faith argument, the Court agreed, the fact that it was the same officer, was immaterial. The warrant was neither bare-bones or conclusory.

The Court reversed the grant of the suppression motion.

U.S. v. Merriweather, Reeves, Montgomery and Lucas, 2018 WL 1517188 (6th Cir. 2018)

FACTS: During Merriweather's trial for drug trafficking, text messages and phone calls were extracted from his cell phone. He argued that the affidavit was lacking in showing probable cause. Merriweather was convicted, and appealed.

ISSUE: Is it reasonable to believe a person's cell phone is used in a drug trafficking case?

HOLDING: Yes

DISCUSSION: The Court reviewed the information and noted that the totality of the evidence indicated that it was reasonable to believe that Merriweather's cell phone was used during his trafficking business. The Court agreed that even if (and it expressed no opinion on the issue) the warrant was in fact insufficient, it was no so bare-bones so as to not trigger the Leon exception.[43]

The Court upheld Merriweather's conviction.

U.S. v. O'Connor, 2018 WL 705646 16-4321 (6th Cir. 2018)

FACTS: Youngstown (OH) officers were notified of an attempted break in at a home, with the subjects brandishing a shotgun. A vehicle was described and one of the men was identified by name. The next day, the vehicle was located at an address and the named subject, who was a convicted felon, already had an arrest warrant for the weapon. The officers obtained a search warrant for the house where the vehicle was parked and ultimately, a semi-automatic rifle was found.

O'Connor moved for suppression and was denied. He was convicted of the firearms charges and appealed.

ISSUE: Must a warrant, from a practical viewpoint, demonstrate that contraband be found at a specific location?

HOLDING: Yes

[43] U.S. v. Leon, 468 U.S. 897 (1984).

DISCUSSION: O'Connor argued that the presence of the vehicle (rented in his name) at that address was insufficient to support a search warrant for that address. The Court noted that "for a search warrant to issues, two requirements must be met." The first is that the affidavit, from a practical viewpoint, demonstrate a reasonable likelihood that the items are connected to the crime, as would be the case for O'Connor possessing a firearm. Second, it must be shown that the item would be likely to be found in that location. It is not, critical, for example, that the location be the residence of the suspect.

The Court agreed that the information provided in the warrant was sufficient and upheld O'Connor's conviction.

U.S. v. Perkins, 887 F.3d 272 (6th Cir. 2018)

FACTS: Based upon information collected in an investigation for drug trafficking, a package was discovered to have methamphetamine and intercepted after a dog sniff. Agent Warren (DEA) obtained an anticipatory warrant for Perkins' home. The trigger was Perkins' acceptacnce of the "maloderous package" – at which point, officers would search the home. However, at this point, "things did not go as planned." The officer who was acting as the delivery driver was not briefed that he needed to actually put it in Perkins' hand, instead, he left it with a woman and never confirmed her identity of whether Perkins was even present. (He was not.)

Evidence was found and Perkins, he arrived later, was charged. He moved to suppress, arguing that the anticipatory warrant was invalid as the trigger was not met. The District Court granted the motion to suppress and the Government appealed.

ISSUE: Must an anticipatory warrant be carefully followed to be valid?

HOLDING: Yes

DISCUSSION: The Court began, "Many good Fourth Amendment stories begin with dogs. And so it is here." The Court posed the question – "what happens when an anticipatory warrant's triggering event never happens?" The Court noted that "Well, it depends." As a general rule, that would mean that the warrant itself was voided. However, the Court agreed that it could be read in a more commonsense manner, not hypertechnically.

But, the Court continued, the warrant in this case specifically stated the package was to be hand-delivered to Perkins, not someone else. The Court noted that "law enforcement needs to say what it means and mean what it says when proposing a triggering condition as part of an anticipatory warrant."[44]

The Court upheld the suppression.

[44] U.S. v. Miggins, 302 F.3d 384 (6th Cir. 2002).

SEARCH & SEIZURE – EXPECTATION OF PRIVACY FOR GUESTS

U.S. v. Allen, 2018 WL 300074 (6th Cir. 2018)

FACTS: On June 22, 2009, Hindy was stopped for erratic driving. Allen and Nelson (age 17) were passengers. Hindy admitted that Nelson was a prostitute and Nelson admitted she worked for Allen. Hindy stated Allen was staying with her. She was charged with DUI.

In custody, Hindy told the officers to watch her apartment because Allen "did bad things with young women" and sold marijuana. Nelson and Allen were staying there. She told them she wanted Allen out and asked them to remove his belongings, clothing and duffle bags. She gave a consent to search and the keys, and the detectives went to search. They found the bedroom unlocked and HIndy's belongings in the closet as she'd indicated. They also spotted two cellphones, a laptop and a camera, along with bags that had no identification visible. They looked at camera footage and found Nelson depicted, nude. Those items were seized, as were two other laptops Hindy turned over once she returned home.

A search warrant was obtained for a forensic search of the electronics. Allen was in custody and told what they were doing, and claimed to be "legit" – making a reality TV show. Eventually, he was charged with a variety of child pornography offenses.

He moved for suppression, and was denied. He was convicted and appealed.

ISSUE: If a person is treating a location as "home," have they developed an expectation of privacy there?

HOLDING: Yes

DISCUSSION: Allen argued that he had a reasonable expectation of privacy in Hindy's apartment. The Court agreed that "A person—whether social guest or renter—has a reasonable expectation of privacy in the place where he sleeps at night."[45] To determine the reasonableness of such an expectation, the Court had to consider ""the person's proprietary or possessory interest in the place to be searched or item to be seized[;] whether the defendant has the right to exclude others from the place in question; whether he had taken normal precautions to maintain his privacy; whether he has exhibited a subjective expectation that the area would remain free from governmental intrusion; and whether he was legitimately on the premises."[46]

[45] Minnesota v. Olson, 495 U.S. 91 (1990).
[46] United States v. Waller, 426 F.3d 838 (6th Cir. 2005) (quoting United States v. King, 227 F.3d 732 (6th Cir. 2000)).

The Court continued: "People—whether renters, couch surfers, or nomads—have a reasonable expectation of privacy in places that function as home." Even though Allen was pursuing a criminal enterprise, he'd spend at least two weeks treating the apartment as his home and kept items there, as such, he had a reasonable expectation of privacy there.

However, the Court agreed, under the independent source doctrine, the evidence was found lawfully.

The key evidence discovered during the search at issue—sexually explicit footage of Nelson—was discovered in three places: on the camcorder seized by police during the consent search of Hindy's apartment, on a laptop turned over to police by Hindy two days after the first search, and on another laptop that was the product of a valid search warrant executed two years later at Allen's sister's residence. The camcorder footage was included in the affidavits supporting the warrant for the forensic search of the camcorder and laptop and the search warrant for Allen's sister's home. But excluding the camcorder footage, the warrant applications contained probable cause: the statements of Allen's victims made to police independent of the warrantless search of Hindy's apartment.

Before police set foot in Hindy's apartment, Hindy told police that she suspected Allen of pandering women for prostitution, selling drugs, and doing "bad things with young women." Allen's pattern of activities—leaving men with Nelson in the bedroom—corroborated her suspicions. Hindy also told officers that Allen had asked her to pose for pictures that he could use for prostitution advertisements in the Metro Times. Both Hindy and Nelson indicated that Nelson was working for Allen as a prostitute.

Two other victims had provided information for a search warrant for Allen's sister's home, where he was found to have belongings. As such, his motion was properly denied.

SUSPECT IDENTIFICATION

Pittao v. Hoffner, 2018 WL 509319 (6th Circ. 2018)

FACTS: In 1997, Tamara Pittao was found murdered in her apartment Michigan; she had been dead for several days at the time. Her estranged husband became the prime suspect and was identified by a witness as being at his wife's apartment complex in the days before her body was found.

Pittao was convicted and appealed. His conviction was affirmed by the Michigan state courts and he took an appeal in the federal courts.

ISSUE: Does putting out information on a suspect vehicle taint the identification process?

HOLDING: No

DISCUSSION: Pittao argued that the methods the police used in seeking an identification of a suspect tainted the process, as they had posted pictures of a suspect vehicle, a Jeep. (Pittao drove a blue Jeep.) The witness had been shown several vehicles and had identified a Jeep as the vehicle being driven by the man he saw. He identified Pittao in a photo array.
The court upheld the process, and Pittao's conviction.

42 U.S.C. §1983

42 U.S.C. §1983 – ARREST

Seales v. City of Detroit, 2018 WL 627106 (6th Cir. 2018)

FACTS: Officer Zberkot was a Detorit PD officer assigned to the Detroit Fugitive Apprehension Team (DFAT). On January 18, 2012, they were serving an arrest warrant for Siner, who also used the alias "Marvin Seals." A Marvin Seales was arrested, and repeatedly told the officers he was not the right person. He stayed in jail for close to two weeks, at which point the victim in Siner's case confirmed he was not the suspect he knew as Siner. The case was dismissed.

Seales filed suit for false arrest and related claims. Among other rulings, the District Court agreed that Zberkot was not entitled to summary judgement and was not immune. He appealed.

ISSUE: Do officers have a responsibility to make an effort to verify the identity of a suspect under arrest who claims they are not the correct person?

HOLDING: Yes

DISCUSSION: The Court first addressed the arrest. The Court agreed that properly issued warrants are presumed valid. In this case, the Court noted, Seales had essentially the same name as Siner's alias, was the same sex, race and age as Siner and was working at the same geographic location were Siner lived. DFAT had previously developed the address and since it was known Seales used aliases, it was reasonable to expect Siner to lie about his name

The Court agreed it was not unreasonable to make the mistake and gave Zberkot qualified immunity on that claim.

The Court went on to address his prolonged detention. The Court noted that officers have a responsibility to verify the identity of the person they have arrested, Seales had protested that he was the wrong man numerous times, had even filed a grievance from the jail. There was a mug shot of Siner and the Court noted "two men who look nothing alike." Fingerprints were available for comparison as well. Seales also had a different birth date and address, all

items of exculpatory evidence. The Court agreed that his right not to be held longer than necessary was violated, and clearly established. For that, the Court agreed he was not entitled to immunity.

42 U.S.C. §1983 – SEARCH WARRANT

Peffer (Julie & Jesse) v. Stephens, 880 F.3d 256 (6th Cir. 2018)

FACTS: In March 2011, Jesse Peffer met Beemer at the latter's medical-marijuana dispensary. Peffer became a caregiver for several individuals using medical marijuana and began selling marijuana he grew in excess of his needs to Beemer. Beemer, however, became a CI with local drug task forces and attempted to persuade Peffer to sell him more marijuana than the law permitted. Peffer refused. While in route to meet with Beemer, Peffer was stopped by several officers and they found him in possession of 15 ounces of marijuana. Peffer calculated he was entitled to have that amount in his possession, given the number of patients and the amount allowed for each. However, as his patients had dwindled in number, in fact, he had twice as much as he was allowed. He was charged.

A few months later, the school attended by Beemer's children and social services received a letter identifying Beemer as a CI, and expressed concern for his children given Beemer's maintaining a "drug house." However, the officer from who the letter purported to originate denied sending the letter, and Peffer became the suspect. (There were also two other suspects who had also been arrested under similar circumstances.) One of the troopers received a package of marijuana seeds that were supposedly returned to him (as the purported sender) for insufficient postage – the trooper denied sending the package.

In the meantime, Peffer took a plea to a minor charge. Soon thereafter, flier were mailed to a number of businesses identifying Beemer as a CI. Due to the way the flier was worded, Peffer was the primary suspect, and the other suspects were disregarded.

On July 31, 2014, Sgt. Stephens obtained a search warrant for the Peffer home, seeing evidence of the fliers and other mailings. Among items sought were computers and related devices. However, the prosecution declined to initiate charges against the Peffers. The Peffers filed suit against Stephens and other officers, for the traffic stop and the home search.

The District Court granted Stephens' motion for summary judgement, and the Peffers appealed.

ISSUE: Is it reasonable to assume that a person's possessions will be kept at their residence?

HOLDING: Yes

DISCUSSION: The Peffers argued that the affidavit lacked sufficient probable cause to support the search of the house. The Court agreed that, as a rule, "police officers are entitled to rely on a judicially secured warrant for immunity from a § 1983 action for illegal search and seizure unless the warrant is so lacking in indicia of probable cause, that official belief in the existence of probable cause is unreasonable."[47] That is because "the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or . . . in 'objective good faith.'"[48]

A magistrate's issuance of a warrant, however, does not always result in qualified immunity: there is "an exception allowing suit when 'it is obvious that no reasonably competent officer would have concluded that a warrant should issue.'"[49]

First, they argued that the sending of the letters wasn't actually illegal. The Court ruled that it wasn't necessary for it to determine whether there was even a constitutional violation as the officer's assessment of the state law was reasonable given Michigan's laws on intimidation of a witness and impersonation of an officer. Although ultimately, a court may have determined his conduct was not a crime, it was not settled law at the time.

The Peffers also argued there was no evidence of a connection between their residence and the mailings. The Court agreed, however, that the affidavit as a whole provides links between Peffer and the mailings, and the mailing bore a postmark for the office close to where the Peffers lived. He was the only one of the suspects for whom the facts matched. The Court noted that it was to be expected that a computer would be expected to be located at a subject's residence, rather than kept at another location.

The Court continued:

> It appears to be a question of first impression in this circuit whether the nature of a computer is such that its use in a crime is alone sufficient to justify an inference that, because of "the nature of the things to be seized," ibid., evidence of the crime is likely to be found in the alleged criminal's residence. But this question is not a difficult one to answer based on basic principles.
>
> As a general rule, it is reasonable, ceteris paribus, to assume that a person keeps his possessions where he resides. This presumption is of course rebuttable and cannot always be relied upon by a magistrate in finding a nexus between the object used in a crime and the alleged criminal's residence, because the "totality of circumstances presented" in the affidavit may suggest that the object is more likely to be found elsewhere or nowhere at all.

[47] Yancey v. Carroll Cty., 876 F.2d 1238 (6th Cir. 1989).
[48] Messerschmidt v. Millender, 565 U.S. 535 (2012) (quoting United States v. Leon, 468 U.S. 897 (1984)).

> The affidavit may, for example, include evidence suggesting that the object was not owned by the alleged criminal; that it was discarded, sold, or was otherwise disposed of; that the alleged criminal, while retaining possession of the object, stores it elsewhere than his residence; or that the object no longer exists.

Specifically, "if an affidavit presents probable cause to believe that a crime has been committed by means of an object, however, a magistrate may presume that there is a nexus between that object and the suspect's current residence, unless the affidavit contains facts that may rebut that presumption."

The Court upheld the warrant and the dismissal of the case against Sgt. Stephens.

Greer v. City of Highland Park, 884 F.3d 310 (6th Cir. 2018)

FACTS: On October 29, 2014, the Greers lived in West Bloomfield Township, Michigan. At about 4 a.m., SWAT officers blew open the door with a shotgun, but did not knock and announce. The Greers and their three daughters were held at gunpoint on the kneeds, and their nephew, Lawrence, who was pending the night, was handcuffed. They were denied an opportunity to see a search warrant. The officers were looking for a "dangerous Russian" who had lived in the home more than a year before. Nothing was found. When they complained, the underlying search warrant was produced.

The Greers filed suit, arguing that the search warrant was invalid and/or that the warrant was improperly executed. The officers moved for qualified immunity and were denied. The officers appealed.

ISSUE: Is knock and announce the default rule for a search warrant?

HOLDING: Yes

DISCUSSION: The Court agreed that as a rule, search warrants require a knock and announce, and a wait of a reasonable period of time. Although drugs may alter that requirement, it does not justify total abandonment of the rule. Further, at night, the length of time must be lengthened. The Court agreed the execution was totally improper and further, that the warrant should have been promptly produced.

Further, the officers argued that the Greers were required to specify what each officer did during the process, which they were unable to do because the officers work masks and refused to provide names. The court agreed that was also improper and upheld the Greers.

Finally, the Court agreed that the Greers were entitled to a knock and announce, and to view the warrant, and the failure was unconstitutional. The Court upheld the denial of qualified immunity.

42 U.S.C. 1983 – FIRST AMENDMENT

Enoch / Corbin v. Deputy Sheriff Hogan / Nobles / Hamilton County (OH) Sheriff's Office, Neil, 2018 WL 1444194 (6th Circ. 2018)

FACTS: Enoch and Avery alleged that they were taking photos and video using mobile devices at an impromptu press conference in a courthouse hallway in Hamilton County. They alleged they were singled out from the group by the deputies because of their race. The deputies searched both Ipads. Both argued that white participants, also recording, were not treated in the same way. They were both detained for a substantial period of time and Enoch's requests to use the restroom were denied.

Both were charged with disorderly conduct and failure to identify herself as required under state law. All charges were subsequently dismissed and Enoch alleged she lost her job as a result of the arrest.

Both filed suit under 42 U.S.C. §1983, arguing their First and Fourth Amendment rights were violated. The defendants requested qualified immunity and were denied; they appealed.

ISSUE: Can a questionable, even non-existent rule violation, justify an arrest?

HOLDING: No

DISCUSSON: The deputy sheriffs raised only one defense to all of the claims, that they were "enforcing a courthouse rule." That rule required prior permission to record inside the courtrooms. The Court noted that the rule did not mention hallways and that there was leeway for judges to decide whether a space was a prohibited "ancillary area." There was, in this case, no specific order prohibiting the use of electronic devices in the hallway.

The Court looked at the interaction, at the outset, as a Terry stop. But to arrest, probable cause was required. The Court agreed that even if they could be briefly investigated for the situation, they could not be arrested for violating a non-existent rule.

The Court agreed that Enoch and Corbin had made a plausible allegation of a violation of the First Amendment rights, that were clearly established. That led to the Fourth Amendment violation as well.

The Court upheld the denial of qualified immunity.

42 U.S.C. §1983 – PROCEDURE

Jordan v. Blount County (TN), 885 F.3d 413 (6th Cir. 2018)

FACTS: In March 1998, Byerley was murdered. Jordan was convicted, but had never been informed about exculpatory evidence found near the scene. On appeal, his conviction was affirmed on direct appeal, but eventually his conviction was vacated and the case remanded. He was acquitted in 2015.

Jordan filed suit about a prosecutor, a detective and the county under 42 U.S.C. §1983, for the Brady violation. The District Court ruled that the statute of limitation had run, invalidating the claim, and Jordan appealed.

ISSUE: At what point does a Brady violation claim begin to toll the statute?

HOLDING: When all proceedings are terminated in favor of the plaintiff.

DISCUSSION: The court noted that a claim generally accrues (starts), "when the plaintiff can file suit and obtain relief." The Court equated the case to a malicious prosecution claim, which requires "termination of the prior criminal proceeding in favor of the accused." In Jordan's case, his criminal proceeding did not end until his 2015 acquittal, long after the initial conviction was vacated.

The District Court's decision was reversed and the suit reinstated.

Crabbs v. Scott, 786 F.3d 426 (6th Cir. 2018)

FACTS: Crabbs was arrested in Ohio on a felony charge. He was not given the required DNA test, however, which trigged a "hold." He was acquitted at trial. However, the Sheriff required a DNA sample before he was released. Crabbs filed suit against the Sheriff. Crabbs died before the end of the litigation and his mother moved to take over the case as his representative. The District Court denied her and she appealed.

ISSUE: May another party take over as personal representative if the plaintiff dies, in a §1983 claim?

HOLDING: Yes

DISCUSSION: Under the Civil Rules, "if a party dies and the claim is not extinguished, the court may order substitution of the proper party." The trial court concluded that Crabbs' death extinguished the claim. Since this issue was purely a question of law, the Court gave it a fresh review. Since federal law, however, does not resolve this particular question, survivorship in a §1983 lawsuit, the Court can look to the law of the state in which the action arises, in this case, Ohio. Under Ohio law, a personal representative may take over as the plaintiff when a lawsuit involves injuries to a person.

Under Wilson v. Garcia, among other things, §1983 actions are "best characterized as personal injury actions."[50] In the past, the courts also looked to state law for the appropriate statute of limitations, but that changed with the enactment of 28 U.S.C. §1658, which provided for a four year time frame for all civil rights actions. (In the past, as state laws differed on the statute of limitations for personal injury claims, so did the time frame for bring civil rights actions, which adopted the state statute of limitation. The new federal statute brought all such actions under the same time frame.) However, federal law does not provide the same uniformity for personal injury claims, however. The Court noted "if survivorship statutes are not sibling of time-bar statutes, they are at least cousins."

The Court looked to whether physical harm was required to consider the claim a "person injury," as Crabbs' case was more of an invasion of privacy that carried no physical harm at all. The Court agreed that Ohio law did not make such a distinction.

The Court agreed that Crabbs' lawsuit could continue past his death, and that his mother could serve as his representative.

NOTE: *Kentucky law provides for survivorship of a wrongful death case under KRS 411.130, and all other personal injury actions shall continue as well, under KRS 411.140.*

42 U.S.C. §1983 – FORCE

Flanigan v. Panin, 2018 WL 707402 (6th Cir. 2018)

FACTS: On the morning in question, Flanigan was walking in Clarkston, Michigan. Officer Panin was, at the same time, dispatched to a suspicion person, but there was no allegation of violence. Panin ordered Flanigan to freeze, as he was walking away from Panin. Panin had not, at that point, given Flanigan any other commands. Panin then asked Flanigation to "come speak with him." They spoke, but Flanigan did not provide his name, and ran after Panin said he would be handcuffed. Panin tased Flanigan twice. Flanigan ended up in a friend's backyard and was lying on the ground when Panin found him. Panin maced him, and then struck him in the head multiple times, before handcuffing.

Panin later insisted that Flanigan struggled with him, which Flanigan denied, stating he simply tried to stand up. Flanigan pled guilty to possession of marijuana and a state law that prohibits certain actions in interfering with a officer, but specifically stated he "ran away from the police" and had the marijuana.

Flanigan filed suit against Panin and Oakland County, under 42 U.S.C. §1983, arguing excessive force. The District Court ruled for Oakland County and Panin argued that the claim was barred by Heck v. Humphrey.[51] The Court agreed he was entitled to qualified immunity

[50] 471 U.S. 261 (1985).
[51] 512 U.S. 477 (1994).

for the taser and mace, but not for the actions of hitting him in the head. It ruled the claim was not not barred by Heck, either.

Panin appealed.

ISSUE: Is striking an individual on the ground without need unlawful?

HOLDING: Yes

DISCUSSION: The Court looked to Graham v. Connor for guidance.[52] The Court considered the reported severity of the crime – a suspicious person. Flanigan had not committed any crime at the time Panin encountered him. Flanigan certainly posed some threat once the chase and struggle ensued, and some force was required to subdue him. (He was apparently alcohol impaired, at the least.) He was actively escaping, but was, at the time he was struck, on the ground in control. These factors suggested some force was needed, but "the question is *how much*?" Hitting someone over the head when much lesser force was justified is improper, as Flanigan had a "right not to be struck gratuitiously."

The Court agreed a jury could conclude Panin used excessive force and upheld the denial of summary judgement.

Barton v. City of Lincoln Park, 2018 WL 1129737 (6th Cir. 2018)

FACTS: In November 21, 2013, Barton and Daw visited a local bar in Lincoln Park, Michigan. Each had a number of beers before walking to Barton's home at 1:30 p.m. There, Barton's girlfield refused to drive Daw home. They quarreled, causing her daughter, Ferrante, to call the police.

Officers Kerr and Lasinkas responded. They found Ferrante's boyfriend, Dorow, outside and Barton, Faulkner and Ferrante arguing inside. They entered and ordered Barton to calm down. Other officers arrived. Allegedly, Barton was arrested by the two officers. They grabbed his hand and he pulled it back, having recently had surgery on it. Faulkner confirmed the recent injury. Barton alleged that the officers ignored that, took him to the ground, and struck him. He was driven through screen door head first, as well. He also claimed to have been choked in the cruiser.

Barton was charged with several offenses, all but one of which was dropped. He filed suit under 42 U.S.C. §1983 for force. The officers moved for qualified immunity and were denied. Officer Behrik, who was outside the entire time, was one of the defendants, appealed.

ISSUE: Is mere presence at a scene enough to trigger bystander officer liability?

[52] 490 U.s. 386 (1989).

HOLDING: No

DISCUSSION: The District Court had ruled that Behrik's "mere presence" provide an avenue for a claim that he failed to intervene.[53] The Court agreed, however, that an officer's simple presence was not enough, absent a showing of some direct responsibility. In other words, they had to have observed or had reason to know that excessive force was bing used and they had the means and opportunity to prevent it.[54]

In this case, there was nothing to indicate Behrik was aware of anything more than a commotion inside, and he saw nothing at all. Such a commotion would be expected from a verbal argument with an intoxicated participant. And even had he done so, there is no duty to intervene when the act occurs to rapidly as to prevent a realistic opportunity to do so. It simply didn't last long enough. Finally, nothing occurred that required him to abandoned the two men he was "keeping" outside, as apparently it was agreed that he should do, to go inside and take action.

The Court agreed Officer Behrik was entitled to qualified immunity.

Stanfield v. City of Lima, 2018 WL 1341646 (6th Cir. 2018)

FACTS: On October 4, 2013, Lima police received a call about a RV being driven erratically. They located and followed the vehicle. Stanfield, the driver, pulled into an empty lot, followed by the officers. When he stopped, Officer Garman approached and spoke to Stanfield through the passenger side. Stanfield got out. Officers Rode and Montgomery approached, told him to keep his hands out of his pockets and asked if he had been drinking.

Stanfield put his right hand in his pocket and Garman quickly tried to grab his wrist. Stanfield pulled his hand out and moved away. Montgomery also stepped behind him. Stanfield held up both hands and Garman moved to frisk him. He grabbed Stanfield's left wrist and placed his arm over his head. Stanfield raised his right arm, Montgomery grabbed it and brought it around to behind his back. In an ensuing back and forth, Montgomery forced Stanfield to the ground. He was wrestled to lie on his stomach with his hands under him. The struggle continued but he was ultimately taken into custody for DUI. Under medical examination, he was found to have redness and swelling on his face and a fractured rib.

The officers argued that Stanfield's actions indicated active resistance. Stanfield argued that he was simply intoxicated and lost his balance, causing his movements.

Stanfield filed suit, arguing excessive force. The District Court awarded summary judgement to the officers, and Stanfield appealed.

[53] Bruner v. Dunaway, 684 F.2d 422 (6th Cir. 1982).
[54] Turner v. Scott, 119 F.3d 425 (6th Cir. 1997).

ISSUE: Must force be reasonable?

HOLDING: Yes

DISCUSSION: The Court looked at the perspective of the officers. Even if Stanfield was understood to be intoxicated that was if anything, even more of a possible threat. Recordings from the scene indicate he was not "completely cooperative," but was also not threatening or hostile, verbally or physically. During the struggle, Garman apparently kneed Stanfield in the side, causing the rib fracture. The officers argued their actions were objectively reasonable. Stanfield argued he could not physically comply with the commands because of the officers' actions.

The Court assessed the actions and agreed that the officers could perceive his actions as resistance, even if, in reality, he was not trying to resist. However, the Court found Montgomery's tackle to be excessive and there was little reason to consider his actions to be threatening. Garman's knee strikes were also excessive and not reflective of Stanfield's actions in not producing his hands on command. Officer Rode's actions, striking Garman in the leg with his flashlight, although less extreme, were also excessive.

However, in all three cases, the Court agreed that the officers were entitled to qualified immunity, as the officers were not on clear notice that their actions violated clear constitutional mandate. The Court also dismissed the county.

Carter v. Carter / Montgomery / Krings / Galimbert, 2018 WL 1341663 (6th Cir. 2018)

FACTS: On August 9, 2012, an Eastern Michigan University police officer flashed his lights at Carter, to get him to stop. A chase ensued, involving several agencies, at a high speed. It ended when Carter lost control and crashed into a ditch. He tried to run but Deputy Montgomery (Washtenaw County SO) grabbed him. Carter was struck multiple times, including a face punch from Deputy Carter. It left him dazed. Officers rained kicks and blows on him, causing him to "ball up." He complied with a verbal order to stop resisting, he claimed. Officer Krings also struck him and Deputy Galimbert, he claimed, did not intervene.

Deputy Carter's dashcam told a different story, however. It refuted any claims of kicks, and there were only a few blows observed. Carter had several minor facial injuries and pled guilty to a number of charges, including resisting arrest. He filed a lawsuit claiming excessive force. The officers moved for summary judgement and Carter did not respond. The District Court denied qualified immunity and the officers appealed.

ISSUE: If a video blatantly contradicts the plaintiff's version of the facts, may the court give credence to that video?

HOLDING: Yes

DISCUSSION: The Court noted that although as a rule, it was required to accept a plaintiff's facts in making a judgement, in this case, "upon repeated and careful viewing," it had to conclude that the force used was not as described by Carter and not excessive. His version was "blatantly contradicted" by the record before the court, especially the video. It was "simply not the savage beating he makes it out to be." At most, he was subjected to a "few modest strikes." Even if he was only passively resisting, the use of force was objectively reasonable.

The Court reversed the decision and ruled for the officers.

Thornton v. City of Columbus, 2018 WL 1313419 (6th Cir. 2018)

FACTS: The Thorntons (Guilford and Bonnie) placed a call to the PD about two suspects in a prior assault, several days before. At the same time, a separate call was made that a man at that address had pointed a firearm at his son and a friend, and that he'd approached the man, who was on his porch. That man had pointed a gun at him, as well. Officers Dupler and Kasza (Columbus PD) were dispatched.

As they approached, the spotted a man standing on a porch of the address to which the call had been dispatched, holding a long gun. As they approached, the man went back into the house. Members of a group standing nearby indicated he had a gun and had gone inside. (Thornton later stated he did not have a gun when they approached but the officers maintained he did.) The officers approached with drawn guns. From outside, they could see a rifle, but no persons. They ordered the occupant to come out. Thornton had, in the meantime, retrieved a shotgun, and the officers saw him come into the living room with it cradled in his arms. They loudly and repeatedly ordered him to drop it. When he did not do so, they fired on him several times.

Thornton, who survived, maintained he was shot before he realized the officers were there and that he was walking toward a chair at the time. Only about four minutes elapsed between the dispatch and the shooting.

Bonnie Thornton, who had come out of the back, acknowledged that she heard the officers order Thornton to drop the weapon. Following the shooting, the officers did a walkthrough of the scene individually, and were processed as well. It was determined that Dupler had fired twice and Kasza once. Consistent with policy, they completed formal statements ten days later.

Thornton was charged with aggravated menacing. The couple ultimately filed a lawsuit against the officers for the shooting, and the city moved for dismissal. The trial court ruled in favor of the officers and the city and the Thorntons appealed.

ISSUE: May officers enter a house on exigent circumstances if a subject with a weapon went into that house?

HOLDING: Yes

DISCUSSION: The Court looked at it from the point of view of the officers, who did not know who the subject was. Even though there was a factual dispute as to whether they saw him with the gun, or entered, the Court agreed that exigent circumstances existed and the officers' actions were reasonable. Even if they did not see him with the gun, the Court agreed, they did not know who lived there or if anyone was inside. Analyzing the situation through their eyes, the Court agreed that they did not have to wait until he raised the weapon to take action.

The Court agreed the shooting was justified.

Knowlton (for Garber) v. Richland County, OH, 2018 WL 1109648 (6th Cir. 2018)

FACTS: On March 16, 2014, the Richland County Sheriff's Office received a domestic violence call at the home of Knowlton and Garber. Garber reportedly had a history of mental illness, although the officers many not have been fully aware of the extent. Garber left before their arrival. Knowlton reported she was afraid of Garber and afraid for their children. He had pushed both her and his mother down. They reluctantly signed paperwork, which authorized assault charges, but emphasized they wanted him to go to the hospital. Officer were unable to locate him immediately and a bulletin was issued.

Garber was located by family, in his parents' home, a little later. He implied he had a gun to his mother. He threatened Knowlton by text, and told her he had a gun. Officers responded to his parents' home and found Garber sitting upstairs. Four officers went to the room, and one flipped on the lights in the dark room. Garber refused to show his hands. He told the officers to shoot him. They tried to deescalate the situation but Garber became agitated and held something under his shirt in a teepee fashion. They heard a pop or bang, and officers fired on Garber, killing him. All of the officers later testified they were not firing in response to shots fired by their fellow officers. No weapon was ever found, and photos showed a remote control at the scene. It was tested but nothing could be confirmed as to whether Garber had handled it. The investigation suggested that the sound may have been a gunshot from one of the officers, but it could not be shown either way. The officers were exonerated in an investigation.

Knowlton filed suit, on behalf of Garber's estate. The District Court denied summary judgement to the officers, and the officers appealed.

ISSUE: Is a mistaken shooting necessarily a violation of §1983?

HOLDING: No

DISCUSSON: The Court reviewed the facts under the rules of Saucier v. Katz.[55] The Court agreed that although an "unarmed and nondangerous" suspect has the right to be free of deadly force, whether that suspect is nondangerous is very fact-specific. In this scenario, the Court agreed, the officers "were all justifiably concerned that they were in danger." All three deputies, however, stated they did not believe deadly force was needed until they heard the "popping" sound, and since Garber did not have a firearm, there was no explanation for the sound. As such, because there was a factual dispute in the case, the Court could not resolve it at this stage. Because there was at least some evidence that one of the officers shot, or shot at, Garber, and that the other officers fired in reaction to that gunshot, the Court had to rule in favor of Knowlton at this stage of the case.

The Court noted that this leaves open the possibility that the officers could succeed in claiming that there was a mistaken perception leading to a response that while regrettable, was reasonable.

The court affirmed the decision to deny qualified immunity.

Barberick v. Hilmer / Dover, 2018 WL 1617194 (6th Cir. 2018)

FACTS: On November 16, 2015, Deputy Dover (Boone County SO) was dispatched to the Barberick home in response to a 911 hang-up. He was told by dispatch that a suicide attempt had happened there two weeks before. Barberick and his mother gave conflicting stories to the deputy. His mother indicated he'd swallowed handfuls of pills and that she feared he was trying to overdose again. Barberick admitted to having taken prescribed medication but his denials became conflicting. Dover observed Barberick appeared extremely intoxicated. He asked Barberick to allow an EMT to examine him and he refused. He then arrested Barberick on an outstanding warrant.

Hilmer and Ellision, EMTS, arrived and evaluated Barberick. He concluded he had not taken any narcotics and that he was drunk. He was assisted down to the cruiser, and could not walk on his own. Deputy Steward decided to transport him to the jail, and he was transferred to that deputy's cruiser. Lt. Allen got him laid down in the back seat and he was driven to the jail, six miles away. He was "snoozing or snoring" in the back seat. Once they arrived, he was found unresponsive and not breathing. He was pronounced dead.

Barberick's widow filed suit against all parties, arguing that they were deliberately indifferent to his medical need. Dover, Steward and the two EMTs were denied motions to dismiss. Dover and Steward appealed.

ISSUE: Is it deliberate indifference not to make a medical decision contrary to that of a licensed EMT?

[55] 533 U.S. 194 (2001).

HOLDING: No

DISCUSSION: Barberick introduced a number of cases, but the Court noted that Barberick was examined at the scene by a licensed EMT, and that EMT concluded that he was simply drunk and did not need medical treatment. It was proper for the two deputies to rely on the assessment by the EMTs, and nothing obvious occurred in the meantime, no "neew and alarm symptoms" that changed Barberick's status.

As such, the Court agreed, both deputies were entitled to qualified immunity and reversed the District Court.

TRIAL PROCEDURE / EVIDENCE

TRIAL PROCEDURE / EVIDENCE

U.S v. Bergrin, 885 F.3d 416 (6th Cir. 2018)

FACTS: Paul Bergrin was a criminal defense attorney in New Jersey who worked under the theory of "no witness, no case." He was ultimately convicted of murdering government witnesses and other federal crimes, and sentenced to life in prison. His cousin, Ronald Bergrin (the defendant in this case) decided to seek revenge for those convictions. He "set his sights" on an FBI agent, Brokos, who had taken the lead in the case. He emailed his plan to kill the agent to Paul's daughter, who promptly shared it, preventing the murder.
Ronald Bergrin was charged with threatening the agent, sending interstate threats and cyberstalking. His competence was questioned, eventually and he was committed. In October, 2016, a new doctor found he was competent, but the court eventually disagreed, finding him incompetent. The case was dismissed without prejudice and he was released.
Bergrin stated he would rather be kept in jail and tried than "declared incompetent." He appealed his dismissal.

ISSUE: May an individual appeal the dismissal of their case?

HOLDING: Yes

DISCUSSION: The Court agreed that the right to appeal was statutory, not constitutional. Federal law allows appeals from all final decisions of the federal district courts and a dismissal without prejudice is considered a final decision. The requirement was whether Bergrin retained a "necessary personal stake" in the appeal, not whether he was the prevailing party in the case below. The Court equated the matter to an acquittal on insanity, which is appealable, and both immediately affected his rights.

The court affirmed his right to appeal.

TRIAL PROCEDURE / EVIDENCE – BRADY

U.S. v. Joiner, 2018 WL 1211942 (6th Cir. 2018)

FACTS: Officer John Boe received an alert that his credit card was being used. He discovered his vehicle had been broken into and his wallet and gun had been stolen. Officers reviewed video footage of the parking lot where the truck had been parked but discovered the camera that covered that area was inoperable. They did not recover footage from other cameras. They did review footage from the store where the card was used and identified Joiner through investigative techniques. Officers located and arrested him; he still had the stolen wallet in his possession.

Officer Morgan questioned Joiner, who admitted he'd given the gun to Kam. They were unable to make contact with that individual and never recovered the gun. Some of the items stolen were retrieved, however. He was questioned more thoroughly at the station but that was not recorded. Joiner later gave a different story, though, stating he was the lookout while Kam broke into the truck, and that he never had possession of the gun at all.

Joiner, a convicted felon, was eventually convicted of possession of the gun. He appealed.

ISSUE: Is the failure to collect possibly exculpatory evidence a violation of Brady?

HOLDING: Not necessarily

DISCUSSION: Among other issues, Joiner claimed that the government suppressed exculpatory evidence by not securing the video footage. The Court noted Joiner "falters at each step of his Brady claim."[56] The officers had reviewed the footage and found no reason to secure it, and even had it showed Joiner's vehicle, he admitted he was present at the parking lot. They were not obligated to preserve evidence that a "as-yet-unknown defendant" might find useful in the future.[57] It would have simply not proven anything either way for Joiner.

The Court upheld his conviction.

EMPLOYMENT

Jones v. Wilson County, TN, 2018 WL 527002 (6th Cir. 2018)

FACTS: Jones worked as a probation officer, and reported to the courts about probationers. She was terminated because she made allegedly false statements during a

[56] Brady v. Maryland, 373 U.S. 83 (1963).
[57] Coe v. Bell, 161 F.3d 320 (6th Cir. 1998).

hearing. She filed a lawsuit under 42 U.S.C. §1983, alleging violations of her First Amendment rights and a Tennessee law. The District Court found in favor of the state and Jones appealed.

ISSUE: Does a public employees have speech limitations?

HOLDING: Yes

DISCUSSION: The Court noted that "a public employee's First Amendment right to freedom of speech is subject to limitations when her speech is made pursuant to her official duties."[58] The government has a great deal of authority over the speech of its employees, and it was undisputed her speech occurred while she was working. The Court noted that her statement was made not as a citizen, but as a probation officer, and testifying was part of her official duties.

The Court upheld the dismissal of the case.

EEOC / Stephens v. R.G. & G.R. Harris Funeral Homes, Inc., 2018 WL 527002 (6th Cir. 2018)

FACTS: Aimee (formally Anthony) Stephens was born biologically male. Stephens was living and working at the Harris Funeral Home when she informed Rost, the owner, that she "intended to transition from male to female and would represent herself and dress as a woman while at work." Stephens filed a complaint with the EEOC. During its investigation, they learned that the funeral home provided its male "public-facing" employees with a clothing allowance for clothing that complied with the dress code, but did not provide that for female employees.

The EEOC filed suit under Title VII of the Civil Rights Act of 1964 for Stephens' refusal to conform to sex-based stereotypes and for the discriminatory clothing allowance policy. The District Court ruled in favor of the EEOC and the Funeral Home appealed.

ISSUE: Is discrimination against a transgender in transition illegal?

HOLDING: Yes

DISCUSSION: The Court agreed that Stephens was fired for failing to conform to Sex stereotypes and that it was also proper to pursue a claim on discrimination on the basis of her transgender/ transitioning status. The Court noted that in Price Waterhouse v. Hopkins, gender must be irrelevant to employment decisions.[59] In Smith v. City of Salem, the Court agreed that "under any circumstances, "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination."[60] Unlike cases in which employers had

[58] Garcetti v. Ceballos, 547 U.S. 410 (2006).
[59] 490 U.S. 228 (1989).
[60] 378 F.3d 566, 573 (6th Cir. 2004).

required certain dress, in this case, Stephens was willing to meet the female dress code, she simply refused to follow the employers "notion of her sex."

The Court also agreed that a firing based on transgender status will also be motivated, at least in part, on the individual's sex. The court also noted that a change in status can be the basis for a sex discrimination action, just like penalizing a change in religion might do so. The Court also looked at Vickers v. Fairfield Medical Center and agreed that "plaintiff cannot pursue a claim for impermissible sex stereotyping on the ground that his perceived sexual orientation fails to conform to gender norms unless he alleges that he was discriminated against for failing to "conform to traditional gender stereotypes in any observable way at work."[61]

The Court reversed the summary judgement in favor of the funeral home, and granted summary judgement to the EEOC on the unlawful termination claim.

On a tangential note, although not part of the initial claim, the Court agreed that it was proper for the EEOC to also raise a claim under the clothing allowance issue, as it learned about it during the primary investigation.

Brown v. Metropolitan Government of Nashville and Davidson County, 2018 WL 661539 (6th Cir. 2018)

FACTS: Brown served with the MNPD for 30 years until his retirement in 2014 as a lieutenant. He was acknowledged as an expert on use of force and taught it for the internal academy. He reviewed a use of force report as a routine task and approved it, passing it up the chain. However, it was questioned and became the subject of an internal affairs case. Ultimately, the investigator faulted the original officer in the use of force and the individuals who approved the report, including Brown. The Chief upheld that determination and specifically faulted Brown's attitude during the investigation.

Brown had already had a transfer in the works, but when transferred, a number of onerous restrictions were placed on him. He was also suspended for three days. His base pay was unaffected, but he was limited in taking on, for example, off-duty assignments. Others involved received much lesser punishments. Of those involved, Brown, at 57, was the oldest.

Brown retired 4 months after the transfer. He filed suit against the agency, alleging age discrimination. The District Court ruled in favor of Nashville and Brown appealed.

ISSUE: Is a claim of age discrimination automatic if the subject is over 40?

HOLDING: No

[61] 453 F.3d 757 (6th Cir. 2006).

DISCUSSION: Brown argued that the differential treatment he received forced him to resign and was based upon his age. The employer also created a hostile work environment.

The Court noted that such a claim under age must show three elements. The plaintiff must be at least 40 years of age, be subjected to harassment based on that age and that the harassment "unreasonably interfered with his work performance and created an objectively intimidating, hostile, or offensive work environment."[62] The Court agreed that Brown simply presented no evidence that any of the events were based upon age, and could himself not address any single time when his age was even mentioned.

The Court found no reason to find that age had any bearing on Brown's situation, and affirmed the dismissal of the case.

Neff v. City of East Lansing, 2018 WL 1251721 (6th Cir. 2018)

FACTS: Neff was an officer in East Lansing PD. In 2016, as a sergeant, she initiated a lawsuit, arguing she had been improperly passed over for promotion to Lieutenant. During the pendency, she was promoted to that rank, however. She also claimed she had been denied perks (tuition reimbursement, training and scheduling) given to male officers. In two prior rounds of promotions, between 2011 and 2016, she had been passed over, with the promoting authority indicating that other candidates scored better on the immeasurable qualities such as leadership and being proactive, although all were essentially equal on measurable qualities, such as education.

The District Court ruled in favor of the city and Neff appealed.

ISSUE: Does seniority automatically warrant promotion?

HOLDING: No

DISCUSSION: The Court addressed only the disparate-treatment claim, on the promotion, as Neff abandoned the other claims by not putting for facts supporting them. The Court found her claim of seniority as being insufficient to prove that the city did not have a legitimate, nondiscriminatory reason for passing over Neff for promotion. The city put forth concrete examples for deciding against Neff, which Neff did not refute.

The Court affirmed the decision in favor of the City.

Mys v. Michigan Dept. of State Police, 2018 WL 1251721 (6th Cir. 2018)

FACTS: Sgt. Mys started as a trooper in 1987 and then became a sergeant in 1999. She owned a home near her assigned post, and provided care for her disabled mother. In 2005,

[62] Crawford v. Medina Gen. Hosp., 96 F.3d 830 (6th Cir. 1996).

she alleged Sgt. Miller began unwanted sexual advances, culminating in a sexual assault at her home. The agency considered the allegations unsustained and took no action. A subsequent allegation was classified as unfounded.

During that time frame, Captain Gorski was in command of the post, and he requested Sgt Mys be transferred because of the complaints, placing the blame for a "hostile work environment" on her. He made no request to transfer Sgt. Miller. The request for a temporary reassignment was made to move Mys to another post, but she was not told, instead learning of it inadvertently through another mode, which humiliated her.

The assignment worked out for Sgt. Mys, as it was equidistant from her home, and she elected not to appeal the temporary move. The next step was a permanent transfer decision, and she preferred staying at the new post. Instead she was transferred to a post almost 200 miles away and ended up renting an apartment as well as maintaining the home for her mother. Finally, she took an early retirement and filed suit arguing retaliation for her complaints. In a first trial, the jury found in favor of the MSP, which was vacated when it was determined that all evidence of retaliation was kept from the jury before the final transfer. In the second trial, the verdict was in favor of Sgt. Mys and a substantial damages award was awarded. The MSP appealed.

ISSUE: Is an unwanted transfer of the victim's work site retaliation for filing a discrimination complaint?

HOLDING: Yes

DISCUSSION: The Court noted that the only claim in the case was retaliation. Title VII of the Civil Rights Act of 1964 prohibits such retaliation for complaints about sexual harassment. A prima facie case of retaliation requires that the plaintiff engages in protected activity, the existence of such protected activity was known to the defendant, that the defendant took a "materially adverse" action against the plaintiff and there was a causal connection between the protected activity and the adverse action. The final element, causation, requires a showing that the "unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." A supervisor's actions, of course, bring liability to the employer as well and in this case, although the ultimate transfer decision was made by a board, a direct supervisor initiated the process. (The Court noted that the supervisor could not use the board as a "cat's paw.")

The MSP conceded everything but causation. The Court summarized the issue – was there a connection between the filing of complaints and the transfer, and was that triggered by Gorski's retaliatory animus? As to the latter, Gorski himself admitted that the transfer was necessary " for one reason and one reason only: her sexual-harassment complaints." Although another employee testified before the board, it was at Gorski's direction. The board's decision reflected a clear impression that Sgt. Mys was "culpable" in the need for a transfer, and the court agreed that it was reasonable for a jury to find causation – that the

complaints were the proximate cause of the transfer. "And that is the very definition of retaliation," the Court emphasized. That created a clear "unbroken chain" between Gorski and the board decision.

The Court affirmed the trial court's decision, and the verdict of $350,000, which it also considered appropriate.

MISCELLANEOUS

Liberty Coins, and others, v. Goodman, 748 F.3d 682 (6th Cir. 2018)

NOTE: Although this case involves a specific Ohio state statute, that statute bears striking similarities to Kentucky state law on the same topic.

FACTS: Liberty Coins holds itself out as a dealer in precious metals, but did not have the required license under state law to deal in such items. An inspector paid a visit and instructed the owner to fill out certain forms and to show the metals it had purchased from the public in the prior year. The owner failed to do so. Instead, they filed suit under 42 U.S.C. §1983 against the Ohio Dept. of Commerce, arguing that the Precious Metals Dealers Act (PMDA) was unconstitutional and interfered with his commercial speech. It included another business in the lawsuit, one that had previously had a license but had allowed it to lapse.

The District Court reviewed the statute and agreed that the warrantless searches authorized by the PMDA were facially unconstitutional and issued an injunction against enforcement. It ruled that under City of Los Angeles v. Patel.[63] First, it concluded that the PMDA search provisions "suffer[ed] from the same constitutional deficiencies as" the Los Angeles ordinance that the Supreme Court struck down in Patel: they offered no opportunity for dealers to seek "neutral, pre-compliance review" before being faced with either refusing to submit to a search or being charged with a crime. Moreover, the district court held that even if these businesses were entitled to a reduced expectation of privacy because they were "closely regulated," the statutory provisions were still unconstitutional under the three-part test governing warrantless searches of those industries.

The Court noted that there are "exceptions to this warrant requirement. When a search is conducted for a "special need" other than to investigate criminal wrongdoing, the probable-cause standard is modified. For example, when a search is conducted pursuant to an administrative regime, the government need only make a lesser showing that a search is in accord with "reasonable legislative or administrative standards."[64] For an administrative-search scheme to be constitutional, it generally must offer the subject of the search an opportunity to seek precompliance review of the request by a neutral decisionmaker prior to the imposition of criminal penalties.

[63] 135 S. Ct. 2443 (2015).
[64] Camara v Municpal Court, 387 U.S. 523 (1967).

> The tempered reasonableness standard governing administrative searches is relaxed even further for searches of businesses in "closely regulated" industries. No warrant or opportunity for pre-compliance review may be required at all for searches conducted of businesses in these industries since they are already subject to extensive government oversight and accordingly possess reduced privacy interests.[65]
>
> However, in New York v. Burger, such searches must meet three criteria: (1) "there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made"; (2) "the warrantless inspections must be necessary to further the regulatory scheme"; and (3) "the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant."[66] When the government seeks to impose a penalty for failure to comply with a warrantless inspection, it is the government's burden to establish that the warrantless search fits within this exception.[67]
>
> In this case, the PMDA did not give dealers a chance for a precompliance review to challenge a search, as required under Patel. Although the investigators lack the legal power to bring criminal charges directly, they can refer it, and of course, often police accompany them in the search.

The Court did agree that dealing in precious metals is a closely regulated business. The state analogized it to running an automobile junkyard and the Court agreed, as such businesses have pervasive regulations across the United States and are required to obtain a specific license and keep certain records. Such regulations stem from the use of such businesses to recycle items, similar to junk shops. It noted that "precious metals dealing" is "simply a new branch" of the age-old pawnbroker tree."

> Of most importance, the court looked to whether warrantless searches are necessary to further the state's proffered interests and whether the statutory provisions serve as adequate warrant substitutes—are at issue. First, warrantless searches are necessary if "a warrant requirement could significantly frustrate effective enforcement of the Act." This may be the case when the objects of a search lend themselves to easy concealment or alteration, making "unannounced, even frequent, inspections [] essential." They might also "be necessary if the search objects are likely to change hands quickly or if unannounced inspections will otherwise constrain the market in illicit goods." In the case of junkyards, the Court sanctioned warrantless

[65] See Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (recognizing that "[c]ertain industries have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise") (internal citation omitted).
[66] New York v. Burger, 482 U.S. 691 (1987).
[67] McLaughlin v. Kings Island, 849 F.2d 990 (6th Cir. 1998).

> searches for this purpose because "stolen cars and parts often pass quickly through an automobile junkyard," so "frequent" and "unannounced" inspections were necessary to detect them. The Court also credited the state's belief that, by "controlling the receiver" of stolen property, i.e., the junkyard owners, thieves would be less inclined to unload their stolen merchandise with these individuals, thereby deterring theft. Lastly, the Supreme Court has cautioned that simply seeking to prevent falsification of records or looking to avoid administrative burdens will not be sufficient to conduct a warrantless search.

With this in mind, the Court also noted that statute had to be specific enough to put the businesses on notices of expectations. In this matter, the Court agreed that the Ohio statutes did so, providing detailed requirements for day to day operations and the nature of the records they would need to have available. Given the "fluid and transitory nature of articles," law enforcement needed some flexibility to conduct inspections. The warrantless search applies only to the records and the item, and nothing else.

The Court did, however, disapprove of other regulations in use, as being far too broad. Since most dealers acquiesce without questions, and inspectors have other means at their disposal to force immediate compliance if they do not, those regulations were considered unconstitutional.

The Court affirmed the decision in favor of Liberty Coins, but only with respect to the authorization of warrantless searches. The remainder of the statutes were upheld.

TABLE OF CASES